TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 109

MINERVA JONES, PHILIP A. LEWIS, AND CARTER W. WESLEY, TRUSTEES, ETC., ET AL., APPELLANTS,

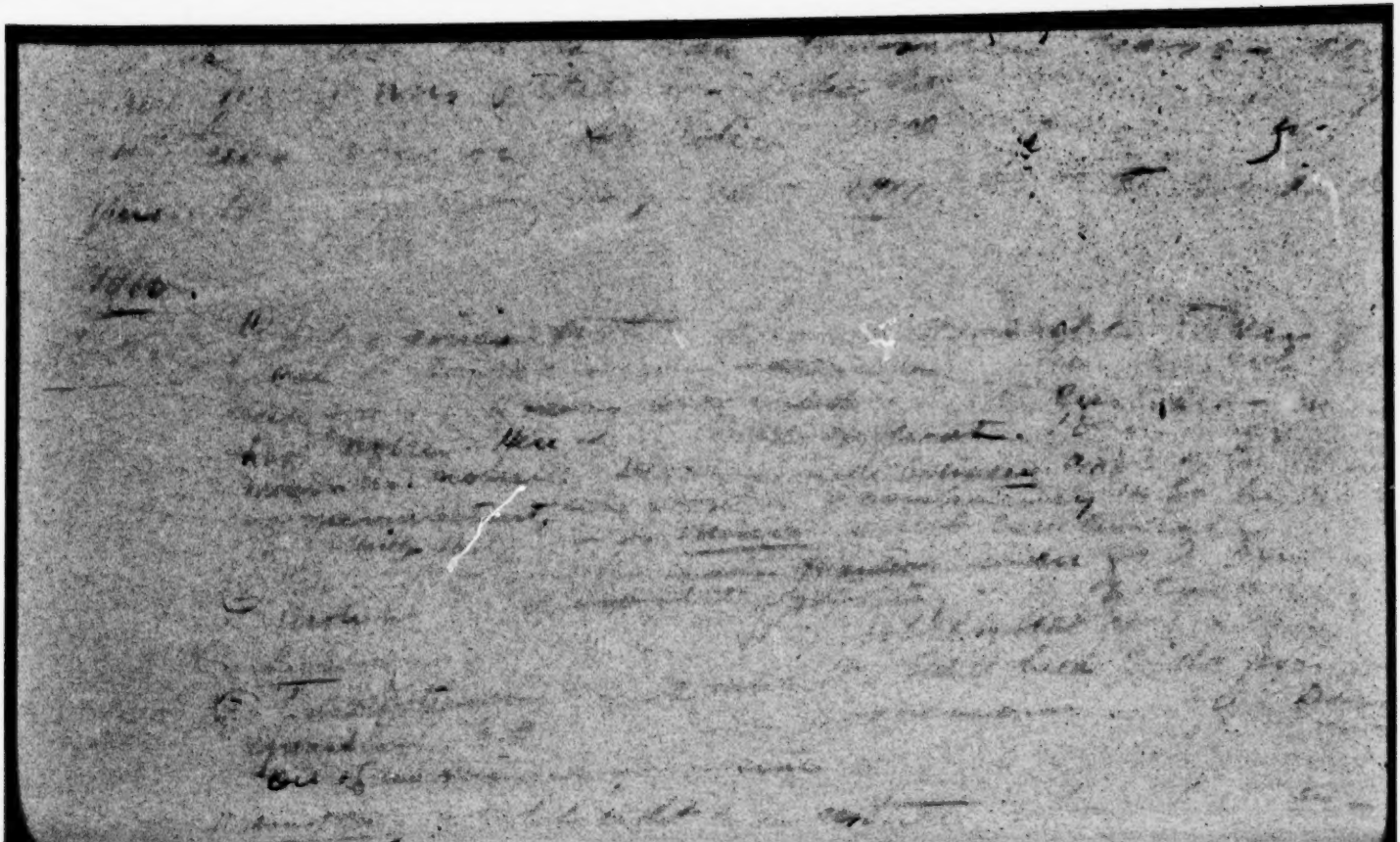
vs.

THE PRAIRIE OIL AND GAS COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED MAY 12, 1926

(31,169)



(31,169)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 458

MINERVA JONES, PHILIP A. LEWIS, AND CARTER W. WESLEY, TRUSTEES, ETC., ET AL., APPELLANTS,

vs.

THE PRAIRIE OIL AND GAS COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 11, 1925

[fols. 1 & 2] CITATION—In usual form, showing service on T. J. Flannelly et al.; filed May 1, 1925; omitted in printing

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[fol. 3] **IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA**

Eq. #7

MINERVA JONES, PHILIP A. LEWIS, and CARTER W. WESLEY, Trustees, Operating and Doing Business as "The Ingram Trust," and Leonard D. Ingram, Relators,

vs.

THE PRAIRIE OIL AND GAS COMPANY, a Corporation, Respondent

SECOND AMENDED BILL OF COMPLAINT—Filed April 14, 1925

Come now the above named relators and, complaining of the above named respondent, in this their Second Amended Bill of Complaint, respectfully show and allege:

I

That the relators, Minerva Jones, Philip A. Lewis and Carter W. Wesley, Trustees, are citizens and residents of the State of Oklahoma and the Eastern United States Judicial District of Oklahoma, and reside at Muskogee in said State; that the relator, Leonard D. Ingram, is a citizen and resident of the State of Ohio, and resides at Cleveland in said State; and that the respondent, The Prairie Oil and Gas Company, is a corporation duly created, organized and existing under and by virtue of the laws of the State of Kansas, is a citizen and resident of said State, and has its principal office and place of business at Independence in said State; and that there are no other parties to this suit.

That the amount or value of the property involved in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

That this action arises under the Constitution and laws of the United States, to wit: under the Fifth and Fourteenth Articles of [fol. 4] Amendment to the Constitution of the United States, and laws pursuant thereto, as will be more fully shown hereafter in this Second Amended Bill of Complaint.

That the full names, citizenship and residence of the parties to this suit are as above set forth.

II

That the relators are the owners and are in possession of the following described real property and premises situated in the County of Creek and State of Oklahoma, to wit:

The Southeast Quarter (S. E. ¼) of the Southwest Quarter (S. W. ¼), and the West Half (W. ½) of the Southwest Quarter (S. W. ¼), and the Northeast Quarter (N. E. ¼) of the Southwest Quarter (S. W. ¼) of Section Two (2), Township Nineteen (19) North, Range Seven (7) East of the Indian Base and Meridian, and containing 160 acres, more or less, according to the Government Survey thereof,

and that they acquired title to said above described property as follows:

1. Said lands were allotted to the relator, Leonard D. Ingram, stricken by order 3/25/25 by the Muskogee (Creek) Nation as the distributive share of the said Leonard D. Ingram in the lands of said Nation, and that patents to said lands were duly issued, on July 1, 1907, to said Leonard D. Ingram, in due form of law, as by the laws of the United States in such cases made and provided. Copies of said patents are hereto attached, marked "Exhibit A" and "Exhibit B" respectively, and made a part of this Second Amended Bill of Complaint.

2. Said Leonard D. Ingram did, on the 30th day of July, 1924, execute and deliver to the said Minerva Jones, Philip A. Lewis and Carter W. Wesley, as Trustees, his certain Deed of Trust, by and under which the said Leonard D. Ingram did make and constitute the said Minerva Jones, Philip A. Lewis and Carter W. Wesley his Trustees with respect to the above described lands. A copy of said Deed of Trust is hereto attached, marked "Exhibit C," and made a part of this Second Amended Bill of Complaint.

[fol. 5] III

By Order 3/25/25

[That said relator, Leonard D. Ingram, was born on the 30th day of July, 1903, and was, on the 3rd day of January, 1911, a minor.]*

That on said 3rd day of January, 1911, a purported order was made by the County Court of Wagoner County, State of Oklahoma, in Probate Case No. 1158, which purported and attempted to appoint one Minervia Ingram as guardian of the person and estate of said relator, Leonard D. Ingram, including the above described lands.

That the purported appointment of said alleged guardian was and is void for the reason that no notice of any kind whatsoever was given to anybody of the hearing of the application for the appointment of a guardian of the person and property of said relator, Leonard D. Ingram, and that, by and under the Constitution and laws of the State of Oklahoma, the County Court of Wagoner County, State of Oklahoma, never acquired and was wholly without jurisdiction to appoint a guardian to take charge of and dispose of the property

[*Words and figures enclosed in brackets erased in copy.]

of said relator, Leonard D. Ingram, or for any other purpose, and that said purported and attempted appointment of a guardian of the person and estate of said relator, Leonard D. Ingram, was and is null and void.

That said purported appointment of a guardian of the person and estate of said relator, Leonard D. Ingram, is further void for the following reasons, to wit:

1. That the Fourteenth Article of Amendment to the Constitution of the United States provides in part as follows:

"No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. That, on said 3rd day of January, 1911, said relator, Leonard D. Ingram, was a citizen of the United States an entitled to the benefit and protection of said provision of the Constitution of the United States, and that under and by virtue of said provision said relator, Leonard D. Ingram, was entitled to personal service of notice upon him of the hearing for said purported appointment of a guardian of his person and estate, and was entitled to an opportunity to be heard in defense of his liberty and property before the County Court of Wagoner County, State of Oklahoma, could make a valid appointment of a guardian of the person and estate of said relator, Leonard D. Ingram.

[fol. 6] 3. That no notice of any kind whatsoever was given to said relator, Leonard D. Ingram, either by personal service of notice upon him, or otherwise, of the hearing upon which the County Court of Wagoner County, State of Oklahoma, attempted to appoint a guardian of the person, property and estate of said relator, Leonard D. Ingram, aid that said purported and attempted appointment was and is in violation of the above quoted provision of the Fourteenth Article of Amendment to the Constitution of the United States, and is null, void and of no effect.

4. That in fact and in truth no notice of any kind whatsoever was given to anybody or in any manner of the hearing for said purported and attempted appointment of a guardian of the person, property and estate of said relator, Leonard D. Ingram, and that said purported and attempted appointment of a guardian of the person, property and estate of said relator, Leonard D. Ingram, is therefore null, and void and of no effect both under the Constitution and laws of the State of Oklahoma, and under the Constitution and laws of the United States.

IV

That on the 24th day of January, 1911, acting under and by virtue of the aforesaid void order in said Probate Case No. 1158,

Wagoner County, State of Oklahoma, purporting and attempting to appoint her as guardian of the person and estate of said relator, Leonard D. Ingram, but in truth and in fact acting wholly without any authority of law, and in violation of the rights of said relator, Leonard D. Ingram, the said Minervia Ingram did execute and deliver unto said respondent, The Prairie Oil and Gas Company, a purported and pretended oil and gas lease covering the above described lands, which purported and pretended oil and gas lease, as relators are informed and believe, purports to have been executed by said alleged guardian for a period during the minority of said [fol. 7] relator, Leonard D. Ingram, and as much longer thereafter as oil or gas is found in paying quantities.

That said purported and pretended oil and gas lease is null and void for the following reasons, to wit:

1. That said Minervia Ingram was not the guardian of the person, property, or estate of said relator, Leonard D. Ingram, and had no power or authority to execute or deliver said purported and pretended oil and gas lease to said respondent, or to any one else.

2. That no notice of any kind whatsoever was given to said relator, Leonard D. Ingram, or to any one, or in any manner, of the purported sale of said purported and pretended oil and gas lease, and that the said purported sale was made without having given said relator, Leonard D. Ingram, an opportunity to be heard in his defense, and that the same is therefore null, void and of no effect.

3. That the respondent, The Prairie Oil and Gas Company, was not in fact the purchaser of said purported and pretended oil and gas lease.

4. That said purported and pretended oil and gas lease purports to have been executed for an indefinite period beyond the minority of said relator, Leonard D. Ingram, and that the same is null, void and of no effect for the reason that the purported and attempted execution and approval of said purported and pretended oil and gas lease violates the Constitution of the State of Oklahoma and the Fourteenth Article of Amendment to the Constitution of the United States, in that the same attempts to deprive said relator, Leonard D. Ingram, of his liberty and property without due process of law, and to deny to said relator, Leonard D. Ingram, the equal protection of the laws.

5 That said alleged guardian had no power to execute or deliver and the County Court of Wagoner County, State of Oklahoma, had no power to approve said purported and pretended oil and gas lease.

That the relators have never been and are not now in possession of said purported and pretended oil and gas lease, and that they are therefore unable to attach a copy thereof to this Second Amended Bill of Complaint.

V.

That on the 18th day of March, 1911, acting under and by virtue of said void order in Probate Case No. 1158, Wagoner County, Okla-

homa, purporting to appoint her as guardian of the person and estate of Leonard D. Ingram, but in fact acting wholly without any authority of law and in violation of the rights of said relator, Leonard [fol. 8] D. Ingram, the said Minervia Ingram did execute and deliver unto the respondent, The Prairie Oil and Gas Company, a second pretended and purported oil and gas lease covering the above described lands, which purported and pretended oil and gas lease, as relators are informed and believe, purports to have been executed for a period during the minority of said relator, Leonard D. Ingram, and as much longer thereafter as oil or gas is found in paying quantities.

That said purported and pretended oil and gas lease is null and void for the reasons stated above in paragraph IV of this Second Amended Bill of Complaint; which reasons are hereby adopted and made a part of this paragraph.

That the relators have never been and are not now in possession of said purported and pretended oil and gas lease, and that they are therefore unable to attach a copy thereof to this Second Amended Bill of Complaint.

VI

That on the 18th day of December, 1911, acting under and by virtue of the aforesaid void order in Probate Case No. 1158, Wagoner County, Oklahoma, purporting to appoint her as guardian of the person and estate of said relator, Leonard D. Ingram, but in truth and in fact acting wholly without any authority of law, and in violation of the rights of said relator, Leonard D. Ingram, the said Minervia Ingram did execute and deliver unto the respondent, The Prairie Oil and Gas Company, a third purported and pretended oil and gas lease covering the above described lands, which purported and pretended oil and gas lease, as relators are informed and believe, purports to have been executed for a period during the minority of said relator, Leonard D. Ingram, and as much longer thereafter as oil or gas is found in paying quantities.

That said purported and pretended oil and gas lease is null and void for the reasons stated above in paragraph IV of this Second Amended Bill of Complaint, except the third reason thereof; which reasons, to wit: the said first, second, fourth and fifth reasons of said paragraph IV, are hereby adopted and made a part of this paragraph.

That the relators have never been and are not now in possession of said purported and pretended oil and gas lease, and that they are therefore unable to attach a copy thereof to this Second Amended Bill of Complaint.

[fol. 9] VII

That all of the aforesaid purported and pretended oil and gas leases are null, void and of no effect for the further reason that they were executed and delivered without any authority of law and were not executed in manner and form required by law.

VIII

That all of the aforesaid purported and pretended oil and gas leases are null, void and of no effect for the following further reason, to wit:

1. That the patent issued to said relator, Leonard D. Ingram, as above set forth covering

The Southeast Quarter (S. E. ¼) of the Southwest Quarter (S. W. ¼) of Section Two (2), Township Nineteen (19) North, Range Seven (7) East, in Creek County, State of Oklahoma,

provides in part as follows:

"Subject however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrances whatever for twenty-one years."

2. That the restrictions against alienation and the exemption from taxation so provided for by Congress and incorporated in said patent to the relator, Leonard D. Ingram, were meant and intended by Congress, and by the Muskogee (Creek) Nation, and by the members of said Nation, and were in fact and in law and equity a part of the consideration for the relinquishment of the interest of the relator, Leonard D. Ingram, in the tribal lands of the Muskogee (Creek) Nation, and that the said relator, Leonard D. Ingram, would not have relinquished his said interest in said tribal lands had said provision not been inserted in and made a part of said patent.

3. That said restrictions against alienation and the exemption from taxation so provided for by Congress and incorporated in said patent to the relator, Leonard D. Ingram, were intended by Congress as, and in fact, law and equity became valuable property rights of the relator, Leonard D. Ingram, which he accepted as a part of the consideration for relinquishing his property interests in said tribal lands.

[fol. 10] 4. That at the time that each and all of the aforesaid purported and pretended oil and gas leases were executed and delivered the above quoted provision in said patent was in full force and effect, and that said alleged guardian was therefore without any power to execute or deliver, and the County Court of Wagoner County, State of Oklahoma, was without any power to approve said purported oil and gas leases.

5. That any and all Acts of Congress which attempt to destroy the above quoted provision in said patent to the relator, Leonard D. Ingram, are null and void, in that they attempt to deprive said relator, Leonard D. Ingram, of his property without due process of law, and are therefore in violation of the Fifth Article of Amendment to the Constitution of the United States, which provides in part as follows:

"No person shall be held to answer for" * * * "nor be deprived of life, liberty, or property without due process of law."

IX

That during the year 1920 the respondent, The Prairie Oil and Gas Company, without the consent of the relators, or any of them, went upon the lands first described herein, and have continued to go upon said lands without the consent of the relators, or any of them, and have removed from said lands and appropriated to its own use without the consent of the relators, or any of them, large quantities of oil and gas; that the value of said oil and gas so removed from said lands by the respondent without the consent of the relators, or any of them, exceeds three million dollars, but that the exact value thereof is unknown to the relators.

X

That said purported and pretended oil and gas leases, and each and all of them, are and constitute a cloud upon relators' title to the property first described herein and, unless declared null and void and cancelled and set aside by this court, will irreparably injure relators in their title to said property.

[fol. 11]

XI

That said respondents, The Prairie Oil and Gas Company, is still going upon the lands herein first described and removing oil and gas therefrom, and are appropriating without the consent of the relators said oil and gas, except one eighth of the same, and that, upon the final hearing of this action said respondent should be restrained and enjoined from going upon said lands and removing the oil and gas therefrom; otherwise said respondent will continue to go upon said lands and remove the oil and gas therefrom without the consent of the relators or any of them.

Wherefore, premises considered, said relators, Minerva Jones, Philip A. Lewis and Carter W. Wesley, Operating and Doing Business as "The Ingram Trust," and Leonard D. Ingram, pray that they may have judgment against said respondent, The Prairie Oil and Gas Company, a corporation, and that this court make and enter its order or orders herein in substance as follows:

1. That said respondent be required to set forth specifically the nature of its claim, if any, in and to the following described property, to wit:

The Southeast Quarter (S. E. ¼) of the Southwest Quarter (S W. ¼), and the West Half (W. ½) of the Southwest Quarter (S. W. ¼), and the Northeast Quarter (N. E. ¼) of the Southwest Quarter (S. W. ¼) of Section Two (2), Township Nineteen (19) North, Range Seven (7) East of the Indian Base and Meridian, and situated in Creek County, State of Oklahoma.

that this court decree that the title of the relators in and to the said premises is valid and perfect; and that the said respondent has no right, valid claim or title therein; nor any interest whatsoever in said premises; that the title of said relators be quieted in said premises; and that the respondent be perpetually enjoined and barred from asserting or setting up any title or interest in said premises adverse to said relators in their free and peaceable possession of said premises; and that said respondent be required to bring said purported and pretended oil and gas leases into this court, and that this court order the same to be cancelled.

[fol. 12] 2. That said respondent be required to account to said relators for, and that this court take an account of all of the oil and gas which said respondent has removed from said property and premises and appropriated to its own use; and that said respondent be decreed to pay to said relators the amount which, on taking such account, shall be found due to said relators, or any of them, from said respondent.

3. That said relators have and receive judgment against said respondent for their costs expended herein, and such other and further relief as to this court may seem just and equitable.

Said relators hereby offer and are willing to do equity towards said respondent in manner and form as this court may order or direct, or find just or proper.

Carter W. Wesley, J. Alston Atkins, Charles A. Chandle,
by J. A. A., Solicitors for Relators.

Sworn to by Philip A. Lewis. Jurat omitted in printing.

[fol. 13] "EXHIBIT A" TO AMENDED BILL OF COMPLAINT

Allotment Deed

The Muskogee (Creek) Nation to Leonard D. Ingram, Allotee No. 110, New Born Creek Freedman Roll

To all whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901, (31 Stats. 861), agreement ratified by the Creek Nation May 25, 1901; it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said Tribe by the United States Commission to the Five Civilized Tribes, so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment, forty acres of land as a homestead, for which he shall have a separate deed, and

Whereas, The said Commission to the five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Leonard D. Ingram, a citizen of said tribe, as an allotment, exclusive of a forty acre homestead, as aforesaid,

Now therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said Leonard D. Ingram, all the right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, to-wit:

The West Half of the Southwest Quarter and the Northeast Quarter of the Southwest Quarter of Section 2, Township 19 North, Range 7 East,

of the Indian Base and Meridian, in Indian Territory, containing 120 acres, more or less as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress relating to appraisement and valuation, and to the provisions of the Act of Congress approved June 30, 1902.

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 1st day of July, A. D., 1907.

P. Porter, Principal Chief of the Muskogee (Creek) Nation.
(Seal.)

Department of the Interior

Approved August 15, 1907.

James Rudolph Garfield, Secretary.

P. Porter, P. C. Filed for record on the 23rd day of August, 1907, at — o'clock — M., and recorded in Book 28, Page 408, Record Dawes Commission.

(Signed) Commission to the Five Civilized Tribes. Tams Bixby, Chairman.

[fol. 14] "Exhibit B" to Amended Bill of Complaint

Homestead Deed

The Muskogee (Creek) Nation to Leonard D. Ingram, No. 110, New Born Creek Freedman Roll

Date: July 1, 1907.

To all whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901, (31 Stats. 861), agreement ratified by the Creek Nation, May 25th, 1901,

it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, excepts as therein provided, snould be allotted among the citizens of said Tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment, forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Leonard D. Ingram, a citizen of said tribe, as a homestead.

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Leonard D. Ingram, all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:

Southeast Quarter of the Southwest Quarter of Section 2, Township 19 North, Range 7 East,

of the Indian Base and Meridian, in Indian Territory, containing 40 acres, more or less, as the case may be, according to the United States survey thereof, subject however to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inaliena'le and free from any incumbrances whatever for twenty-one years, and subject also, to the provisions of said Act of Congress relating to the use, devise and descent of said land after the death of said Leonard D. Ingram; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress, approved June 30, 1902, (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 1st day of July, A. D., 1907.

P. Porter, Principal Chief of the Muskogee (Creek) Nation.
(Seal.)

Department of the Interior

Approved August 15, 1907.

James Rudolph Garfield, Secretary.

Filed for record on the 23 day of August, 1907, at — o'clock — m., and recorded in Book 28, Page 408, Record Dawes Commission.

(Signed) Commission to the Five Civilized Tribes. Tams Bixby, Chairman.

[fol. 15] "EXHIBIT C" TO AMENDED BILL OF COMPLAINT

Deed of Trust

Know all men by these presents:

That I, Leonard D. Ingram, of Cleveland, Ohio, in consideration of the sum of One Dollar and Other Good and Valuable Considerations, in hand paid, receipt of which is hereby acknowledged, and in further consideration of the trusts hereinafter incorporated by reference, have granted, bargained, sold, conveyed, assigned, transferred and set over, and, by these presents do grant, bargain, sell, convey, assign, transfer and set over unto P. A. Lewis and Carter W. Wesley, both of Muskogee, Oklahoma, and Minerva Jones, of Baltimore, Maryland, as trustees of the Ingram Trust, the following described property, whether the same be real, personal or mixed, to-wit:

The Southwest Quarter (S. W. $\frac{1}{4}$) of Section Two (2), Township Nineteen (19) North, Range Seven (7) East, situated in Creek County, State of Oklahoma.

together with all of the improvements thereon and the appurtenances thereunto belonging.

To Have and to Hold the said above described property, whether real, personal or mixed, unto the said Trustees, their heirs, executors, administrators, and assigns forever, but subject to and upon all of the trusts and conditions set forth in a certain Deed of Trust executed between the parties hereto on the 30 day of July, 1924, and filed for record on the 6th day of August, 1924, in Book 486 at Page 447, Instrument No. 197,773, of the Records of the County Clerk of Muskogee County, Oklahoma, and also in Book 296 at Page 626 of the Records of the County Clerk of Creek County, Oklahoma, Instrument No. 125,957.

This Deed of Trust is intended to convey to the above named Trustees, subject to the above referred to trusts, all of the right, title and interest of the creator of this trust, Leonard D. Ingram, in and to the above described property, including the oil, gas and other mineral under, above and about the same.

Witness my hand and seal this 30 day of July, 1924.

Leonard D. Ingram, Grantor. (Seal.)

STATE OF OHIO,
County of Cuyahoga, ss:

Before me, the undersigned, a notary public in and for said County and State, on this 30th day of July, 1924, personally appeared Leonard D. Ingram, to me known to be the identical person who executed the within and foregoing Deed of Trust as the creator of the Ingram Trust and the grantor of this trust, and acknowledged to me that he executed the same as his free and voluntary act and

deed for the uses and purposes therein set forth. And I hereby so certify.

F. C. Lyons, Notary Public. My commission expires January 25, 1926.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS THE SECOND AMENDED BILL OF COMPLAINT—Filed April 14, 1925

Now comes the defendant, The Prairie Oil & Gas Company, and respectfully moves the court to dismiss the second amended bill of complaint herein filed for the reason that the plaintiffs have not in and by the said bill made or stated any such cause as doth or ought to entitle them or any of them to any such relief as is thereby sought and prayed for from or against this defendant.

T. J. Flannelly, Paul B. Mason, Gibson V. Hull, Attorneys for Defendant.

[File endorsement omitted]

[fol. 17] IN UNITED STATES DISTRICT COURT

"EXHIBIT C" IN EVIDENCE—Filed April 27, 1925

IN THE COUNTY COURT IN AND FOR WAGONER COUNTY, STATE OF OKLAHOMA

No. 1158

In the Matter of the Guardianship of LEONARD D. INGRAM and MARGARET INGRAM, Monors; C. JONES, Guardian

Order Granting Petition to Transfer Cause to Muskogee County, Oklahoma

Now on this 22nd day of March, 1920, coming on to be heard the petition of C. Jones, as Guardian of Leonard D. Ingram and Margaret Ingram, Minors, for the transfer of this guardianship case from Wagoner County, Oklahoma, to Muskogee County, Oklahoma, and after hearing had thereon and the Court being advised in the premises, finds, that said guardian is the stepfather and with the mother of said wards, Minerva Jones, are the custodians of said wards, and

the said parties herein mentioned have removed from Wagoner County to Muskogee County, Oklahoma, and have established a residence in the City of Muskogee, Oklahoma, where they intend to permanently reside. That the said C. Jones and the said Minerva Jones are all the next of kin of said minors, said C. Jones being the petitioner herein and the said Minerva Jones having accepted service of notice hereof and having in said acceptance of service joined in said application.

It is therefore ordered that the above entitled and numbered cause be removed and transferred to the County Court of Muskogee County, [fol. 18] Oklahoma, and the Clerk of this Court is hereby authorized and directed to transmit to said Muskogee County, Oklahoma, all the papers in said cause upon payment of all accrued costs herein.

W. B. Moss, County Judge. (Seal.)

[File endorsement omitted.]

[fol. 19] IN THE COUNTY COURT

Clerk's Certificate

STATE OF OKLAHOMA,
County of Wagoner, ss:

I, E. L. Riley, Court Clerk within and for the County aforesaid, hereby certify that the above and foregoing is a full true and complete transcript of the order granting petition to transfer cause to Muskogee County, Oklahoma, in the matter of the Estate of Leonard D. Ingram et al., Minors, No. 1158, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Wagoner, Oklahoma, this 18th day of March, 1925.

E. L. Riley, Court Clerk. (Seal.)

Judge's Certificate

STATE OF OKLAHOMA,
County of Wagoner, ss:

I, W. B. Moss, Judge of the County Court of Wagoner County, State of Oklahoma, do hereby certify that the above named E. L. Riley, by whom the foregoing attestation was made, was at the time of so making the same, and is now, Clerk of said Court, to all whose acts as such, full faith and credit should be given as well in Courts of this jurisdiction as elsewhere; that the seal thereto annexed is the seal of said Court, which said attestation so made by him is in due form of law, and that he was entitled so to do.

Witness my hand this 18th day of March, A. D. 1925.

W. B. Moss, County Judge. (Seal.)

Endorsed: Filed in open Court Apr. 27, 1925. District Court.

[fol. 20] IN UNITED STATES DISTRICT COURT

"EXHIBIT D" IN EVIDENCE—Filed April 27, 1925

Clerk's Certificate

STATE OF OKLAHOMA,
County of Muskogee, ss:

I, Fred N. Hamilton, Court Clerk within and for the County aforesaid, hereby certify that the above and foregoing is a full, true and complete transcript of the Order for Hearing Petition for Appointment of Guardian in Case No. 1158 Wagoner County (which was in 1920 duly transferred to Muskogee County and is now a part of the Muskogee County Records) In re: Estate of Leonard D. Ingram, a minor, Minerwia Ingram, Guardian, as the same remains of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of County Court at my office in Muskogee, Oklahoma, this 17th day of March, A. D. 1925.

Fred N. Hamilton, Court Clerk, by Sam D. Rose, Deputy Court Clerk. (Seal.)

Judge's Certificate

STATE OF OKLAHOMA,
County of Muskogee, ss:

I, Wm. A. Killey, Judge of the County Court of Muskogee County, State of Oklahoma, do hereby certify that the above named Fred N. Hamilton by whom the foregoing attestation was made, was at the time of so making the same, and is now, Clerk of said Court, to all whose acts as such, full faith and credit should be given as well in Counts of this jurisdiction as elsewhere; that the seal thereto annexed is the seal of said County Court, which said attestation so made by him is in due form of law, and that he was entitled so to do.

Witness my hand this 17th day of March, A. D. 1925.

Wm. A. Killey, Judge. (Seal.)

[fol. 21] STATE OF OKLAHOMA,
County of Wagoner:

IN COUNTY COURT

In the Matter of the Guardianship of LULA CURTIS, NANCY CURTIS, LEONARD D. INGRAM, and MARGARET INGRAM, Minors

Order for Hearing Petition for Appointment of Guardian

Bow, on this 15 day of December, 1910 Minervia Ingram having filed in this Court her petition showing that it is necessary that a

Guardian should be appointed for the persons and estates of Lulu Curtis, Nancy Curtis, Leonard D. Ingram and Margaret Ingram, Minors, and praying that Letter of Guardianship issue to Menervia Ingram,

It is ordered that said petition be and hereby is set for hearing on the 3" day of January, 1911 at ten o'clock A. M. and that notice thereof be given by posting notices in three public places in said Wagoner County, one of which shall be posted at the front door of the Court House in Wagoner.

W. T. Drake, County Judge.

STATE OF OKLAHOMA,
County of Muskogee, ss:

I, L. D. Martin, Court Clerk, within and for the county of Muskogee, State of Oklahoma, hereby certify that the within and foregoing is a true and correct copy of the order for hearing application for appointment of Guardian in case #1158, Wagoner Co., which case was duly transferre- to Muskogee Co., in 1920., in this matter as the same appears of record in my office.

In witness whereof, I hereunto set my hand and affix my official seal at Muskogee, Oklahoma, this 25 day of Nov. 1924.

L. D. Martin, Court Clerk, by Margaret Ogden, ex Officio Deputy. (Seal.)

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

"EXHIBIT E" IN EVIDENCE—Filed April 27, 1925

Clerk's Certificate

STATE OF OKLAHOMA,
County of Muskogee, ss:

I, Fred N. Hamilton, Court Clerk within and for the County aforesaid, hereby certify that the above and foregoing is a full, true and complete transcript of the Notice of Application for Appointment of Guardian in Case No. 1158 Wagoner County (which was in 1920 duly transferred in Muskogee County and is now a part of the Muskogee County Records) In re: Estate of Leonard D. Ingram, a minor, Menervia Ingram, Guardian, as the same remains of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of County Court at my office in Muskogee, Oklahoma, this 17th day of March, A. D. 1925.

Fred N. Hamilton, Court Clerk, by Sam D. Rose, Deputy Court Clerk. (Seal.)

Judge's Certificate

STATE OF OKLAHOMA,
County of Muskogee, ss:

I, Wm. A. Killey, Judge of the County Court of Muskogee County, State of Oklahoma, do hereby certify that the above named Fred N. Hamilton by whom the foregoing attestation was made, was at the time of so making the same, and is now, Clerk of said Court, to all whose acts as such, full, faith and credit should be given as well in Courts of this Jurisdiction as elsewhere, that the seal thereto annexed is the seal of said County Court, which said attestation so made by him is in due form of law, and that he was entitled so to do.

Witness my hand this 17th day of March, A. D. 1925.
Wm. A. Killey, Judge. (Seal.)

[fol. 23] STATE OF OKLAHOMA,
County of Wagoner:

IN THE COUNTY COURT

Notice of Application for Appointment of Guardian

The State of Oklahoma to Menervia Ingram and the next of kin of Lulu and Nancy Curtis, Leonard D. and Margaret Ingram, minors:

You are hereby notified that Minervia Ingram has filed in this Court an application for the appointment of Minervia Ingram as Guardian of estate of Lulu Curtis, Nancy Curtis, Leonard D. Ingram and Margaret Ingram, minors, and that said Application will be heard at the court room of said court in the City of Wagoner in said County of Wagoner on the 3rd day of Jany., 1910, at 10 o'clock A. M., at which time you may appear and show cause, if any you have, why said application should not be granted.

Witness my hand and the seal of said Court, at Wagoner in said County, this 15th day of Dec., 1910.
W. T. Drake, County Judge. (Seal.)

Proof of Service

STATE OF OKLAHOMA,
County of Wagoner, ss:

I, the undersigned, being duly sworn, on oath say that on the 16" day of Dec., 1910, I served the within notice on the within named (a) Lulu Curtis, Nancy Curtis, Leonard D. Ingram and Margaret Ingram and Minervia Ingram all next of kin and persons who have the care of said minors by mailing to them and each of them

postage prepaid, a copy of said within notice, also posted a notice in three public places in said County as follows: on the 15" day of December, 1910, he posted one notice at the front door of the Court house in Wagoner, said County, where said hearing is to be had, and one notice on the front window of the Porter State Bank and one on the front door of the law office of Rhea & Rhea in Porter, Wagoner County, Oklahoma. That all of said minors and next of kin are residents of Wagoner County, Oklahoma.

Evert V. Rhea.

Subscribed and sworn to before me this 3" day of January, 1911. W. T. Drake, County Judge. (Seal.)

Endorsed: No. 1158. Lulu Curtis et al., minors. Notice. Filed in Wagoner County Jan. 3, 1911:

[fol. 24] STATE OF OKLAHOMA,
County of Muskogee, ss:

I, L. D. Martin, Court Clerk within and for the County of Muskogee, State of Oklahoma, hereby certify that the within and foregoing is a true and correct copy of the Notice of Application for appointment of Guardian in Case # 1158 Wagoner Co., which case was duly transferred to Muskogee Co., in 1920 in this matter as the same appears of record in my office.

In Witness Whereof, I hereunto set my hand and affix my official seal at Muskogee, Oklahoma, this 25 day of Nov., 1924.

L. D. Martin, Court Clerk, by Margaret Ogden, ex Officio Deputy. (Seal.)

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed April 27, 1925

Now, on this 27th day of April, 1925, the above cause came on for hearing by agreement of all parties upon the motion of the defendant herein filed to dismiss the second amended bill of complaint; and thereupon the plaintiffs prayed leave to further amend the said second amended bill of complaint by attaching thereto exemplified copies of an order transferring the guardianship proceeding involved herein from Wagoner County, Oklahoma, to Muskogee County, Oklahoma, of the order of the County Court of Wagoner

County dated December 15, 1910, setting the application for guardianship for hearing upon January 3, 1911, and of the notice of the said hearing, which prayer and request was by the court granted and the second amended bill of complaint further amended accordingly. And thereupon the said motion to dismiss the second amended bill of complaint as so amended was ordered refiled as of this date to the said second amended bill of complaint as so amended and proceeded to hearing; and the court having heard the arguments of counsel, the said motion to dismiss is by the court sustained, to which the plaintiffs except, and thereupon the plaintiffs elected to stand upon their second amended bill of complaint as so amended this day.

Therefore, it is by the court ordered, adjudged and decreed that the said motion to dismiss is sustained, and the said second amended [fol. 25] bill of complaint as amended this day be and the same is dismissed for want of equity at plaintiffs' costs; to all of which the plaintiffs except.

F. E. Kennamer, Judge.

O. K. as to form. Wesley, Atkins & Chandler, for Relators.

O. K. West, Gilson, Sherman, Davidson & Hull, Attys. for Defendants.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed May 1, 1925

Come now the above named relators and, feeling themselves aggrieved by the decree rendered and entered in the above entitled cause on the 27th day of April, 1925, do hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors heretofore filed herein, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of such court in such cases made and provided.

Your petitioners further pray that the proper order relating to the required security be made.

Carter W. Wesley, J. Alston Atkins, Solicitor for the Relators.

The appeal prayed for in the above and foregoing petition is hereby granted and allowed this 1 day of May, 1925, and the appeal bond herein is fixed at the sum of $500.00.

F. E. Kennamer, Judge.

[File endorsement omitted.]

[fol. 28] IN UNITED STATE DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 1, 1925

Now comes the above named relators in the above entited cause and file the following assignment of errors upon which they will rely upon the prosecution of their appeal in the above entitled cause from the decree made and entered by this Honorable Court on the 27th day of April, 1925, which decree dismissed the second amended bill of complaint of relators as amended.

I

That the United States District Court for the Northern District of Oklahoma erred in dismissing the second amended bill of complaint of relators as amended.

II

Said court erred in holding that it was not a violation of the 14th Article of Amendment to the Constitution of the United States and the due process clause of said amendment for the State of Oklahoma, through its agency, the County Court of Wagoner County, Oklahoma, to deprive Leonard D. Ingram, one of the relators herein, of his property in the following manner: first, by appointing a guardian of the person and property of said relator, Leonard D. Ingram, without the service of any notice of any kind in any manner upon the said Leonard D. Ingram or upon anyone else, and without giving the said Leonard D. Ingram any opportunity to be heard in defense [fol. 29] of his liberty and property; second, by authorizing said purported guardian so appointed without notice to execute oil and gas mining leases upon the lands of said Leonard D. Ingram without any notice of any kind in any manner to said Leonard D. Ingram or to anyone else, and without giving said Leonard D. Ingram an opportunity to be heard in defense of his property.

III

Said court erred in not holding that such an appointment of a guardian of the person and property of said relator, Leonard D. Ingram, without the service of any notice of any kind upon said Leonard D. Ingram or any one else was void as being in violation

of the 14th Article of Amendment to the Constitution of the United States in that the same deprived said relator, Leonard D. Ingram, of his liberty and property without due process of law.

IV

Said court erred in not holding that such appointment of a guardian of the person and property of said relator, Leonard D. Ingram, was void under the Constitution and laws of the State of Oklahoma, for the reason that no notice was given of the hearing of the application for such appointment.

V

Said court ererd in holding that such appointment of a guardian as aforesaid, and such execution of oil and gas mining leases upon the lands of said Leonard D. Ingram as aforesaid were valid under the Constitution and laws of the State of Oklahoma, and in not holding the same to be void under said Constitution and laws.

VI

Said court erred in holding that the State of Oklahoma under the Constitution of the United States and the State of Oklahoma, through its agency, the County Court of Wagoner County, Oklahoma, had [fol. 30] the power to deprive the relator, Leonard D. Ingram, of his property by appointing a guardian of the person and property of said Leonard D. Ingram without any notice and authorizing such guardian so appointed to execute, without any notice whatsoever, valid oil and gas mining leases upon the lands of said Leonard D. Ingram for a period extending during the alleged minority of said Leonard D. Ingram, "and as much longer thereafter as oil or gas is found in paying quantities;" and in not holding that such leases were void under the Constitution and laws of the State of Oklahoma, and that they deprived said relator, Leonard D. Ingram, of his property without due process of law, in violation of the 14th Article of Amendment to the Constitution of the United States.

VII

Said court erred in holding that the Act of Congress of May 27, 1908 (32 Stat. at L. 503) which attempted to destroy and remove the restriction against alienation contained in the Homestead Deed from the Muskogee (Creek) Nation to the relator, Leonard D. Ingram, as a member of said Nation, did not and does not deprive the relator Leonard D. Ingarm of his property without due process of law contrary to the 5th Article of Amendment to the Constitution of the United States and in not requiring respondent to account to relators as prayed for.

VIII

Said court erred in sustaining the motion of respondent to dismiss the second amended bill of complaint of relators as amended, and in not overruling said motion.

Wherefore relators pray that said decree be reversed and entered for relators.

Carter W. Wesley, J. Alston Atkins, Solicitors for the Relators.

[File endorsement omitted.]

[fol. 31] Bond on Appeal for $500—Approved and filed May 1, 1925; omitted in printing

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[fol. 32] In United States District Court

[Title omitted]

Stipulation re Transcript of Record—Filed May 1, 1925

In the above entitled cause it is hereby mutually agreed and stipulated between the relators and the respondent that the transcript of the record to be prepared by the Clerk of the above styled court for filing in the Supreme Court of the United States pursuant to the appeal taken by the above named relators in the above entitled cause shall consist of the following:

First. The Second Amended Bill of Complaint of the relators, as amended by order of court.

Second. The motion of the respondent to dismiss said second amended bill of complaint as amended.

Third. The Decree of court entered April 27, 1925, dismissing said second amended bill of complaint as amended.

Fourth. The assignment of errors.

Fifth. The petition for appeal and the order of court allowing same.

Sixth. The bond on appeal.

Seventh. The citation on appeal and proof of service of same.

Eighth. This stipulation and the Clerk's Certificate to said Transcript.

Carter W. Wesley and J. Alston Atkins, Solicitors for Relators. T. J. Flannelly, Paul B. Mason, Nathan A. Gibson, West, Gibson, Sherman, Davidson & Hull, Solicitors for Respondent.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Northern District of Oklahoma, ss:

I, H. P. Warfield, Clerk of the District Court of the United States for the Northern District of Oklahoma, do hereby certify the foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court in case No. 7, In Equity, wherein Minerva Jones, Philip A. Lewis, and Carter W. Wesley, Trustees, operating and doing business as "The Ingram Trust", and Leonard D. Ingram, is plaintiff and The Prairie Oil and Gas Company, a corporation, is defendant, as full, true and complete as the said transcript purports to contain, and as called for by the Præcipe for Transcript of the above record set forth.

I further certify that the original citation is hereto attached and returned herewith.

I further certify that this case was transferred to this Court from the District Court of the United States for the Eastern District of Oklahoma, on April 14, 1925.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Tulsa, in said District, this 7th day of May, A. D., 1925.

H. P. Warfield, Clerk, by H. W. James, Deputy. (Seal.)

Endorsed on cover: Filed No. 31,169. N. Oklahoma D. C. U. S. Term No. 458. Minerva Jones, Philip A. Lewis, and Carter W. Wesley, trustee, etc., et al., appellants, vs. The Prairie Oil and Gas Company. Filed May 12th, 1925. File No. 31,169.

No. [redacted] 108

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1925.

MINERVA JONES, PHILLIP A. LEWIS, AND CARTER W. WESLEY, TRUSTEES, ETC., ET AL., Appellants,

vs.

THE PRAIRIE OIL AND GAS COMPANY, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

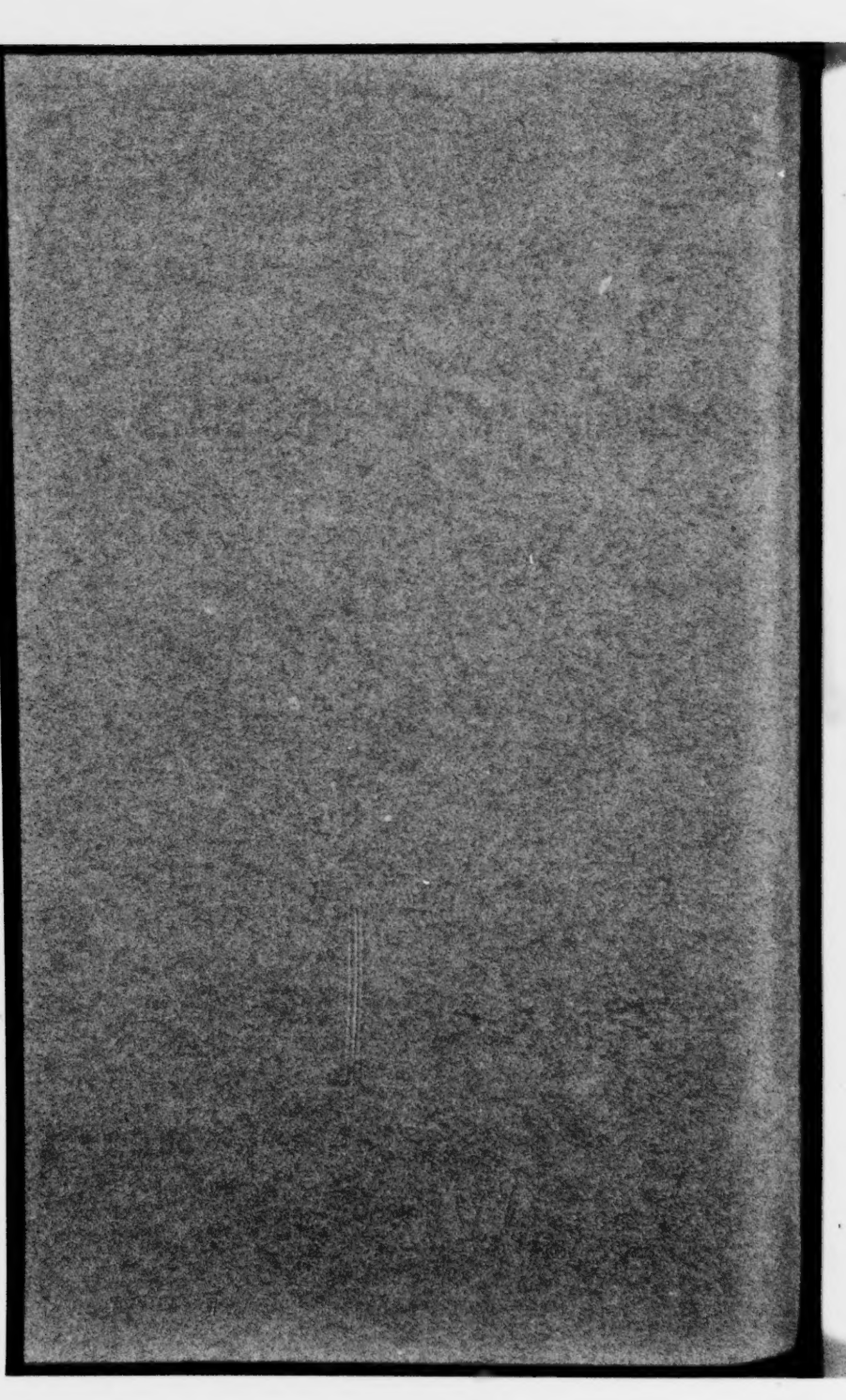
BRIEF OF APPELLANTS.

CARTER WALKER WESLEY,

Solicitor for Appellants.

J. ALSTON ADKINS,

Of Counsel.



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AUTHORITIES CITED.

AUTHORITIES—CONTINUED.

AUTHORITIES—CONTINUED.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 458.

MINERVA JONES, PHILLIP A. LEWIS, AND CARTER W. WESLEY, TRUSTEES, ETC., *ET AL., Appellants,*

vs.

THE PRAIRIE OIL AND GAS COMPANY, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

BRIEF *of* APPELLANTS.

Preliminary Statement.

Leonard D. Ingram is the owner of the Southwest Quarter of Section Two, Township Nineteen North, Range Seven East (SW4 of 2-19-7), situated in Creek County, State of Oklahoma.

On December 13, 1910, a petition was filed in Probate Case No. 1158, in the County Court of Wagoner County, Oklahoma, asking that the said Leonard D. Ingram be declared a minor and that a guardian be appointed for him. The court set the petition down for hearing on January 3, 1911, and entered an order that notice should be given of the hearing as of that date by posting in three public places (R. 14-15). No notice of any kind was given that

the hearing would be on that date. Leonard D. Ingram was never notified of the hearing. The record shows that a notice was mailed and posted of a hearing to be had on January 3, *1910* (R. 18-17).

Despite the fact that the record showed on its face that no notice or process had been served to give the court jurisdiction, the court attempted to assume jurisdiction and appointed Minerva Ingram as guardian of Leonard D. Ingram, on January 3, 1911.

On January 24, 1911, acting under the above order in Probate Case No. 1158, County Court, Wagoner County, Oklahoma, purporting to appoint her guardian of the person and property of the said Leonard D. Ingram, Minerva Ingram executed an oil and gas lease to the Prairie Oil and Gas Co., covering the above described land for the period of minority and as much longer as oil and gas is found in paying quantities.

On March 18, 1911, acting under the said order, in Probate Case No. 1158, County Court, Wagoner County, Oklahoma, purporting to appoint her as guardian of the person and estate of Leonard D. Ingram, the said Minerva Ingram executed a second pretended oil and gas lease covering the above described land for the period of the minority of the said Leonard D. Ingram, and as much longer as oil and gas is found in paying quantities.

On December 18, 1911, acting under the said order, in Probate Case No. 1158, County Court, Wagoner County, Oklahoma, purporting to appoint her as guardian of the person and estate of Leonard D. Ingram, the said Minerva Ingram executed a third pretended oil and gas lease covering the above described land for the period of the minority

of the said Leonard D. Ingram, and as much longer as oil and gas is found in paying quantities.

The proceedings for the execution of each of said pretended oil and gas leases were all had on the respective dates given above, without notice of any kind having been given therefor to anybody.

Thereupon, and in the year 1920, the Prairie Oil and Gas Company moved in on Leonard D. Ingram's one hundred and sixty acres, above described, and began to take the oil and gas from it.

The above entitled action was brought by Minerva Jones, Philip A. Lewis and Carter W. Wesley, trustees, and Leonard D. Ingram, appellants, to clear their title against the Prairie Oil and Gas Company, a company incorporated under the laws of the State of Kansas, and for an accounting against the said company, in the United States District Court for the Eastern District of Oklahoma, on October 22, 1924. The case was duly transferred to the Northern District of Oklahoma upon the creation of that district, and tried on the second amended bill of complaint of relators and the motion to dismiss of respondent below, and resulted in a judgment dismissing the second amended bill of complaint of relators, whereupon the case was brought to this court.

The District Court did not write an opinion in this case on the hearing below.

Second Amended Bill of Complaint.

The appellants, relators below, filed a second amended bill of complaint, in lieu of their original bill of complaint (R. 1-8) in which they allege in substance:

I.

That the relators, Minerva Jones, Phillip A. Lewis and Carter W. Wesley, trustees, were citizens and residents of the State of Oklahoma and the Eastern District of Oklahoma, and reside in the City of Muskogee in the said state; that the relator, Leonard D. Ingram, was a citizen of the State of Ohio and resided at Cleveland in said state; and that the respondent, The Prairie Oil and Gas Company, was a corporation duly created, organized and existing under the laws of the State of Kansas; that the amount of property involved exceeds the value of three thousand ($3,000.00) dollars exclusive of interest and costs; that the action arises under the Constitution and Laws of the United States, especially under the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States, and laws pursuant thereto.

II.

That the relators were the owners of the one hundred sixty acres of land in Creek County, State of Oklahoma, specifically described as follows:

> Southeast Quarter (SE4) of the Southwest Quarter (SW4) and the West Half (W2) of the Southwest Quarter (SW4) and the Northeast Quarter (NE4) of the Southwest Quarter (SW4) of Section Two (2), Township Nineteen (19) North, Range Seven (7) East of the Indian Base and Meridian, and containing 160 acres, more or less, according to the government survey thereof;

that said lands were allotted to the relator, Leonard D Ingram, by the Muskogee (Creek) Nation as the distributive share of the said Leonard D. Ingram in the lands of said nation, and that patents were duly issued, on July 1,

1907, to said Leonard D. Ingram; that said Leonard D. Ingram did, on the 30th day of July, 1924, execute and deliver to the said Minerva Jones, Phillip A. Lewis and Carter W. Wesley, as trustees, his certain deed of trust, by which he constituted said Minerva Jones, Phillip A. Lewis and Carter W. Wesley his trustees, with respect to the above described land.

III.

That on the 3rd day of January, 1911, a purported order was made by the County Court of Wagoner County, State of Oklahoma, in Probate Case No. 1158, which purported order attempted to appoint Minerva Ingram as guardian of the person and estate of said relator, Leonard D. Ingram, including the above described land; that the purported appointment of said alleged guardian was null and void because no notice was given of the application for the appointment of a guardian of the person and property of said relator, Leonard D. Ingram, and that, under, the Constitution and Laws of the United States and the State of Oklahoma, the County Court of Wagoner County, State of Oklahoma, never acquired jurisdiction to appoint a guardian to take charge of and dispose of the property of said relator, Leonard D. Ingram; that the purported appointment of a guardian of the person and estate of the said relator, Leonard D. Ingram, is further void for the reason that it violates the Fourteenth Article of Amendment to the Constitution of the United States, which provides that property shall not be taken without due process of law.

IV.

That on the 24th day of January, 1911, acting under and by virtue of the aforesaid void order in Probate Case

No. 1158, County Court, Wagoner County, State of Oklahoma, purporting to appoint her as guardian of the said relator, Leonard D. Ingram, the said Minerva Ingram did execute and deliver unto the said respondent, The Prairie Oil and Gas Company, a purported oil and gas lease covering the above described land, which purported oil and gas lease, as relators are informed and believe, purports to have been executed by said alleged guardian for a period during the minority of said relator, Leonard D. Ingram, and as much longer thereafter as oil and gas is found in paying quantities; that said purported oil and gas lease is null and void for the reasons:

1. That Minerva Ingram was not the guardian of the person and property or estate of the said relator, Leonard D. Ingram, duly appointed by law, and had no authority to convey any interest in the said land.

2. That no notice of any kind whatsoever was given to the said relator, Leonard D. Ingram, or any one, of the purported sale of said purported and pretended oil and gas lease, and that the purported sale was made without giving the relator, Leonard D. Ingram, an opportunity to be heard in his defense.

3. That said purported and pretended oil and gas lease purports to have been executed for an indefinite period beyond the minority of the relator, Leonard D. Ingram, and that said lease is null and void for the reason that said purported oil and gas lease violates the Constitution of the State of Oklahoma and the Fourteenth Article of Amendment to the Constitution of the United States, in that it attempts to deprive the relator, Leonard D. Ingram, of his liberty and property without due process of law, and to

deny the said relator, Leonard D. Ingram, the equal protection of the laws.

4. That the alleged guardian had no power to execute, and the County Court of Wagoner County, State of Oklahoma, had no power to approve said purported and pretended oil and gas lease.

V.

That on the 18th day of March, 1911, acting under said void order in Probate Case No. 1158, the County Court of Wagoner County, State of Oklahoma, purporting to appoint her as guardian of the person and estate of Leonard D. Ingram, the said Minerva Ingram did execute and deliver unto the respondent, The Prairie Oil and Gas Compani, a second pretended and purported oil and gas lease covering the above described land, which purported and pretended oil and gas lease, purports to have been executed for a period during the minority of said relator, Leonard D. Ingram, and as much longer thereafter as oil and gas is found in paying quantities; that the said purported oil and gas lease is null and void for the reasons stated above under heading designated IV.

VI.

That on the 18th day of December, 1911, acting under and by virtue of the aforesaid void order in probate case No. 1158, County Court, Wagoner County, purporting to appoint her as guardian of the person and estate of relator, Leonard D. Ingram, said Minerva Ingram did execute and deliver unto said respondent, The Prairie Oil and Gas Company, a third purported and pretended oil and gas lease covering the above described land, which purported oil and gas lease, purports to have been executed for a pe-

riod during the minority of said relator, Leonard D. Ingram, and as much longer thereafter as oil and gas is found in paying quantities; that said purported oil and gas lease is null and void for the reasons stated above in heading designated IV.

VII.

That all of the aforesaid purported oil and gas leases are void for the further reason that they were executed and delivered without any authority of law and were not executed in manner and form required by law.

VIII.

That all of the purported oil and gas leases are void for the following further reasons, to-wit:

1. That they violate the patent issued to the relator, Leonard D. Ingram, covering the homestead which is described as follows:

> The southeast quarter of the southwest quarter of section two, township nineteen north, range seven east (SE4 of SW4 of 2-19-7), in Creek County, State of Oklahoma,

which patent provides that the homestead should be inalienable and free from any incumbrances whatever for twenty-one (21) years;

2. That the restrictions against the alienation and exemption from taxation provided by Congress and incorporated in the patent to the said Leonard D. Ingram were meant and intended by Congress as, and by the Muskogee (Creek) Nation, and by the members of said Nation, and were in fact and law and equity, a part of the consideration for the relinquishment of the interest of the relator, Leonard D. Ingram, in the tribal lands of the Muskogee

(Creek) Nation, and that the said relator, Leonard D. Ingram, would not have relinquished his said interest in said tribal lands had said provision not been inserted in and made a part of said patent;

3. That said restrictions against alienation and the exemption from taxation were intended by Congress as, and were in fact valuable property rights of the relator which he accepted as part of the consideration for relinquishing his property interest in said tribal lands;

4. That at the time that each of the aforesaid purported oil and gas leases was given the restrictions against alienation were in force and that any Act of Congress attempting to destroy them is null and void as taking property without due process of law.

IX.

That during the year 1920, the respondent, The Prairie Oil and Gas Company, without the consent of the relators, went upon the lands first described herein, and has continued to go upon the said lands without the consent of the relators, and has removed from said lands and appropriated to its own use large quantities of oil and gas; that the value of said oil and gas exceeds three million dollars, but that the exact value thereof is unknown to the relators.

X.

That said purported and pretended oil and gas leases are and constitute a cloud upon the relators' title to the property first described herein, and unless declared void and cancelled and set aside by this court, will irreparably injure relators in their title to said property. That relators were not and never had been in possession of said purported leases, and, therefore, could not attach copies.

XI.

That said respondent, The Prairie Oil and Gas Company, is still going upon the lands herein first described and removing the oil and gas therefrom and is appropriating, without the consent of the relators, said oil and gas, except one-eighth of the same, and that upon the final hearing of this action said respondent should be restrained and enjoined from going upon said land and removing the oil and gas therefrom; otherwise said respondent will continue to go upon said lands and remove the oil and gas therefrom without the consent of the relators or any of them.

These allegations were followed by a prayer that the title of the relators be quieted and that said purported leases of the respondent be cancelled, and for an accounting, and for the payment of money found to be due to the relators by the respondent, and also for the costs expended by the relators in the suit, and all other proper relief. The patent to Leonard D. Ingram and the deed of trust to the trustees were attached to the second amended bill as exhibits (R. 8-12).

Motion to Dismiss.

The respondent filed a motion to dismiss the second amended bill of complaint (R. 12), alleging as cause or ground that the second amended bill of complaint did not state facts sufficient to entitle the relators to equitable relief, or to any part of the relief sought by them in this action. This motion, of course, admits all facts and matters well pleaded. *(Stromberg Motor Devices Co.* v. *Holley Bros. Co.*, 260 Fed. 220.)

Upon these pleadings the case was heard upon argument of counsel and judgment entered dismissing the sec-

ond amended bill of complaint filed by relators herein (R. 17), the decree being as follows:

Judgment.

Now, on this 27th day of April, 1925, the above cause came on for hearing by agreement of all parties upon the motion of the defendant herein filed to dismiss the second amended bill of complaint; and thereupon the plaintiffs prayed leave to further amend the said second amended bill of complaint by attaching thereto exemplified copies of an order transferring the guardianship proceedings involved herein from Wagoner County, Oklahoma, to Muskogee County, Oklahoma, of the order of the County Court of Wagoner County dated December 15, 1910, setting the application for guardianship for hearing upon January 3, 1911, and of the notice of the said hearing, which prayer and request was by the court g r a n t e d and the second amended bill of complaint further amended accordingly. And thereupon the said motion to d i s m i s s the second amended bill of complaint as so amended was ordered refiled as of this date to the said second amended bill of complaint as so amended and proceeded to hearing; and the court having heard the arguments of counsel, the said motion to dismiss is by the c o u r t sustained, to which the plaintiffs except, and thereupon the plaintiffs elected to stand upon their second amended bill of complaint as so amended this day.

Therefore, it is by the court ordered, adjudged and decreed that the said motion to dismiss is sustained, and the said second amended bill of complaint as amended this day be and the same is dismissed for want of equity at plaintiffs' costs; to all of which the plaintiffs except.

F. E. Kennamer, Judge.

ASSIGNMENT *of* ERRORS.

From said decree appellants perfected their appeal to this court (R. 18-21) making the following assignment of errors (R. 19):

I.

That the United States District Court for the Northern District of Oklahoma erred in dismissing the second amended bill of complaint of relators as amended.

II.

Said court erred in holding that it was not a violation of the 14th Article of Amendment to the Constitution of the United States and the due process clause of said amendment for the State of Oklahoma, through its agency, the County Court of Wagoner County, Oklahoma, to deprive Leonard D. Ingram, one of the relators herein, of his property in the following manner: *First,* by appointing a guardian of the person and property of said relator, Leonard D. Ingram, without the service of any notice of any kind in any manner upon the said Leonard D. Ingram or upon anyone else and without giving the said Leonard D. Ingram any opportunity to be heard in defense of his liberty and property; *second,* by authorizing said purported guardian, so appointed without notice, to execute oil and gas mining leases upon the lands of said Leonard D. Ingram without any notice of any kind in any manner to said Leonard D. Ingram or to anyone else, and without giving said Leonard D. Ingram an opportunity to be heard in defense of his property.

III.

Said court erred in not holding that such an appointment of a guardian of the person and property of said relator, Leonard D. Ingram, without the service of any notice of any kind upon said Leonard D. Ingram or any one else was void as being in violation of the 14th Article of Amendment to the Constitution of the United States in that the same deprived said relator, Leonard D. Ingram, of his liberty and property without due process of law.

IV.

Said court erred in not holding that such appointment of a guardian of the person and property of said relator, Leonard D. Ingram, was void under the Constitution and laws of the State of Oklahoma, for the reason that no notice was given of the hearing of the application for such appointment.

V.

Said court erred in holding that such appointment of a guardian as aforesaid, and such execution of oil and gas mining leases upon the lands of said Leonard D. Ingram as aforesaid were valid under the Constitution and laws of the State of Oklahoma, and in not holding the same to be void under said constitution and laws.

VI.

Said court erred in holding that the State of Oklahoma, under the Constitution of the United States and the State of Oklahoma, through its agency, the County Court of Wagoner County, Oklahoma, had the power to deprive the relator, Leonard D. Ingram, of his property by appointing a guardian of the person and property of said Leonard

D. Ingram without any notice and authorizing such guardian so appointed to execute, without any notice whatsoever, valid oil and gas mining leases upon the lands of said Leonard D. Ingram for a period extending during the alleged minority of said Leonard D. Ingram, "and as much longer thereafter as oil or gas is found in paying quantities;" and in not holding that such leases were void under the Constitution and laws of the State of Oklahoma, and that they deprived said relator, Leonard D. Ingram, of his property without due process of law, in violation of the 14th Article of Amendment to the Constitution of the United States.

VII.

Said court erred in holding that the Act of Congress of May 27, 1908 (32 Stat. at L. 503), which attempted to destroy and remove the restrictions against alienation contained in the homestead deed from the Muskogee (Creek) Nation to the relator, Leonard D. Ingram, as a member of said nation, did not and does not deprive the relator, Leonard D. Ingram, of his property without due process of law, contrary to the 5th Article of Amendment to the Constitution of the United States and in not requiring respondent to account to relators as prayed for.

VIII.

Said court erred in sustaining the motion of respondent to dismiss the second amended bill of complaint of relators as amended, and in not overruling said motion.

FINAL ISSUES.

The above errors may be grouped for the purpose of simplifying the argument into six fundamental questions which therefore become the main issues in the case. Thus:

ERRORS I and IV become ISSUE I:

> Is the sale of an oil and gas lease the sale of real property, and must the procedure prescribed for the sale of real estate of a minor be followed?

ERROR V becomes ISSUE II:

> Was the appointment of a guardian for the person and property of Leonard D. Ingram in this case void under the laws of the State of Oklahoma for the reason that no notice was given of the hearing of the application for the appointment?

Part of ERROR VI and ERROR VIII become ISSUE III:

> Under the state law, (on principle) has the guardian power to execute and the County Court power to approve a lease beyond the minority of a ward?

Part of ERROR VI becomes ISSUE IV:

> If the law of Oklahoma gives the County Court authority, through a guardian, to lease a minor ward's land beyond minority, is the law unconstitutional because it takes property without due process of law?

ERRORS II and III become ISSUE V:

> Is the Oklahoma law which authorizes the appointment of a guardian for the person and property of an individual who is alleged to be a minor, without any notice or opportunity to be heard having been given to such individual, unconstitutional in that it deprives such individual of his liberty and property without due process of law?

ERROR VII becomes ISSUE VI:

As to the Southeast Quarter of the Southwest Quarter of Section Two (2), Township Nineteen (19) North, Range Seven (7) East, are the purported leases in this case void for the reason that they are in contravention of the provisions of the original homestead patent to Leonard D. Ingram?

POINTS *and* AUTHORITIES.

ISSUE I.

The sale of an oil and gas lease is a sale of real property and the procedure prescribed for the sale of real estate must be followed.

Point 1.

A lease is an incorporeal hereditament, and an interest in land.

Duff v. *Keaton*, (1912) 33 Okl. 92, 124 Pac. 291;

Papoose Oil Co. v. *Swindler, et al.*, (1923) 95 Okl. 264, 221 Pac. 506;

Section 1467, Comp. Stat. Okla. (1921), Par. 6555 R. L. 1910;

Section 1470 Comp. Stat. Okla. (1921), Par. 6557 R. L. 1910;

Section 1471 Comp. Stat. Okla. (1921), Par. 6558 R. L. 1910;

Section 1472 Comp. Stat. Okla. (1921), Par. 6559 R. L. 1910;

Woodworth v. *Franklin*, (1922) 85 Okl. 27, 204 Pac. 452, 458;

Bentley v. *Zelma Oil Co.*, (1919) 76 Okl. 116, 184 Pac. 131, 141;

In Re Indian Territory Illuminating Oil Co., 43 Okl. 307, 142 Pac. 997;

Treese v. *Shoemaker*, 80 Okl. 235, 195 Pac. 766;

Tupeker v. *Deaner*, 46 Okl. 328, 148 Pac. 853;

Pluto Oil and Gas Co. v. *Miller*, 95 Okl. 222, 219 Pac. 303;

Parker v. *Riley* (1918), 250 U. S. 66, 63 L. ed. 847;

Shaffer v. *Marks* (1917, E. D. Okl.), 241 Fed. 139;

Lindley v. *Raydure* (1917, E. D. Ky.), 239 Fed. 928, C. C. A. 6th, 249 Fed. 675;

Kolachny v. *Galbreath*, 26 Okl. 772, 110 Pac. 902;

Downey v. *Gooch* (1914, E. D. Okl.), 240 Fed. 527;

Barnes v. *Keyes*, 36 Okl. 6, 127 Pac. 261;

Strawn, et al., v. *Brady, et al.*, 84 Okl. 66, 202 Pac. 505;

Rich v. *Doneghey* (1917), 71 Okl. 204, 177 Pac. 86;

Ohio Oil Co. v. *Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729;

Wilson, et al. v. *Youst*, 28 S. E. 781;

Appeal of Stoughton, 88 Pa. St. Rep. 198;

American Refining Company v. *Tidal Western Oil Co.*, 264 S. W. 335 (Ct. of Civ. Appeals, Tex., May 14, 1924);

Guffey v. *Smith*, 237 U. S. 100, 59 L. ed. 856;

United States v. *Midway No. O. Co.* (1916 S. D. Calif.), 232 Fed. 619;

Kahle v. *Crown Oil Co.* (1913), 180 Ind. 131, 100 N. E. 681;

New Domain O. & G. Co. v *McKinney* (1920), 188 Ky. 183, 221 S. W. 245;

Bender v. *Brooks* (1913), 103 Tex. 329, 127 S. W. 168;

Haskell v. *Sutton* (1903), 53 W. Va. 206, 44 S. E. 533.

Point 2.

The sale of an oil and gas lease on a ward's land should be governed by the law providing for the sale of real property.

Sections 1470, 1471, 1472, 1478, 1263, 1266, 1268, 1284, 1279, Comp. Okl. Stat. 1921;

Tiffany on Real Property, Vol. 1, Sec. 222, p. 520;

Papoose Oil Co. v. *Swindler, et al., supra.*

Issue II.

The appointment of a guardian for the person and property of Leonard D. Ingram in this case was void under the laws of the State of Oklahoma for the reason that no notice was given of the hearing of the application for the appointment.

Cummings, et al. v. *Landes, et al.,* 140 Iowa 80, 117 N. W. 22;

Spence v. *Morris* (Ct. Civ. App. Texas), 28 S. W. 405;

Lyon v. *Vanatta, et al.,* 35 Iowa 521;

Beachy, et al. v. *Shomber,* 73 Kan. 62, 84 Pac. 547;

Ross v. *Breene,* 88 Okl. 37, 211 Pac. 417, 421;

Mullin v. *Hawkins,* 97 Okl. 30, 222 Pac. 697.

Issue III.

Under the state law (on principle) the guardian has no power to execute and the County Court no power to approve a lease beyond the minority of a ward.

Point 1.

The County Court is a court of limited jurisdiction and has only such power as is expressly granted by the Constitution and Statutes.

In Re Bolin's Estate, 22 Okl. 851, 98 Pac. 934;

Garrett v. *London, etc., Ins. Co.*, 15 Okl. 222, 81 Pac. 421;
Starkweather v. *Kemp*, 18 Okl. 28, 88 Pac. 1045;
Rust v. *Gillespie*, 90 Okl. 59, 216 Pac. 480;
Siefert v. *Siefert*, 82 Okl. 230, 200 Pac. 243;
Vol. 9, Amer. & Eng. Ency. of Law, p. 115;
Rex v. *Oakley*, 10 East. 494;
Emerson v. *Spicer*, 46 N. Y. 594;
Clark v. *Burnside*, 15 Ill. 62;
Richardson v. *Richardson*, 49 Mo. 29;
Magruder v. *Peter*, 4 Gill & J. (Md.) 323;
Snook v. *Sutton*, 5 Halst. L. (N. J.) 133;
Willis v. *Cowles*, 4 Conn. 189;
Alexander v. *Buffington*, 66 Iowa 360;
Ross v. *Gill*, 4 Call (Va.) 250;
Vol. II, Bouvier's Law Dictionary, p. 1394.

Point 2.

The Constitution and Statutes do not give the County Court power, through a guardian, or otherwise, to lease a ward's land beyond minority.

Strawn, et al. v. *Brady, et al.*, 84 Okl. 66, 202 Pac. 505;
Byerly v. *Eadie, et al.*, 95 Kan. 400, 148 Pac. 757;
Cochran v. *Teehee*, 40 Okl. 388, 138 Pac. 563;
Sections 4951-4952, Comp. Laws of Okla. (1909);
Haddock v. *Bronaugh*, 92 Okl. 197, 218 Pac. 848;
Carlile v. *National Oil and Development Co.* (1921), 83 Okl. 217, 201 Pac. 377.

Issue IV.

If the law of Oklahoma gives the County Court authority, through a guardian, to lease a minor ward's land beyond minority, the law is unconstitutional because it takes property without due process.

Point 1.

A sane adult citizen is entitled to the unrestricted use and control of his land.

Chicago, Burlington & Quincy Railroad Company v. *City of Chicago*, 166 U. S. 226, 41 L. ed. 979, 984;

Buchanan v. *Warley*, 245 U. S. 60, 62 L. ed. 149, 161;

Holden v. *Hardy*, 169 U. S. 366, 391, 42 L. ed. 780-790, 18 Sup. Ct. Rep. 383;

1 Cooley's Bl. Com. 127;

Scott v. *McNeal*, 154 U. S. 34, 38 L. ed. 896;

Tiernay Coal Co. v. *Smith's Guardian*, 180 Ky. 815, 203 S. W. 731;

Cabin Valley Mining Co. v. *Hall*, 53 Okl. 760, 155 Pac. 570;

Mallen v. *Ruth Oil Co.*, 231 Fed. 845;

Ricardi v. *Gaboury*, 115 Tenn. 485, 89 S. W. 98;

Beaucamp v. *Bertig*, 90 Ark. 350, 119 S. W. 75;

McCreary v. *Billing*, 176 Ala. 314, 58 South. 311.

ISSUE V.

The Oklahoma law which authorizes the appointment of a guardian for the person and property of an individual who is alleged to be a minor, without any notice or opportunity to be heard having been given to him, is unconstitutional in that it deprives such individual of his liberty and property without due process of law.

Point 1.

The laws of Oklahoma do not require notice to the alleged minor.

Crabtree v. *Bath, et al.*, 102 Okl. 1, 225 Pac. 924;

Asher v. *Yorba*, 125 Cal. 513, 58 Pac. 137;

Section 1431 Comp. Okla. Stat. 1921;

Johnson v. *Johnson*, 60 Okl. 206, 159 Pac. 1121;
Johnson v. *Furchtbar*, 96 Okl. 114, 220 Pac. 612;
Bank of Ingersoll v. *Dresia*, 103 Okl. 166, 229 Pac. 567.

Point 2.

The finding by the court that the disability of minority exists is conclusive upon collateral attack.

Lowery, et al. v. *Parton*, 65 Okl. 232, 165 Pac. 164;
Section 803 Comp. Okla. Stat. 1921.

Point 3.

That a person, even though he is in fact a minor, has personal and property rights which are taken away by the appointment of a guardian, is clear.

Sections 4976 and 4977 Comp. Okla. Stat., 1921;
Webb v. *Harris*, 32 Okl. 491, 121 Pac. 1082;
Sections 6586 and 6587 Comp. Okla. Stat., 1921.

Point 4.

Notice and opportunity to be heard are essential elements of due process of law in judicial proceedings, and the absence of these essential elements makes a judgment absolutely void.

Harris v. *Hardeman*, 14 How. 334, 14 L. ed. 444;
Mason v. *Eldred*, 73 U. S. 231, 18 L. ed. 783;
Windsor v. *McVeigh*, 93 U. S. 274, 23 L. ed. 914;
Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565;
Smith v. *Woolfolk*, 115 U. S. 143, 29 L. ed. 357;
Wilson v. *Seligman*, 144 U. S. 41, 36 L. ed. 338;
Mexican Central Ry. Co. v. *Pinkney*, 149 U. S. 194, 37 L. ed. 699;
New York Life Insurance Co. v. *Dunlevy*, 241 U. S. 518, 60 L. ed. 1140;

Clark v. *Wells,* 203 U. S. 164, 51 L. ed. 138;

Postal Telegraph-Cable Co. v. *City of Newport,* 247 U. S. 464, 62 L. ed. 1215;

New York Life Insurance Co. v. *Bangs,* 103 U. S. 441, 26 L. ed. 580;

Webster v. *Reid,* 11 How. 437, 13 L. ed. 761;

Bickerdike v. *Allen,* 41 N. E. 740, 157 Ill. 95;

Simon v. *Craft,* 182 U. S. 437, 45 L. ed. 1165;

Louisville & N. R. Co. v. *Schmidt,* 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 230;

Chaloner v. *Sherman,* 242 U. S. 455, 61 L. ed. 427;

Rees v. *City of Watertown,* 86 U. S. 107, 22 L. ed. 72;

Coe v. *Armour Fertilizer Works,* 237 U. S. 413, 59 L. ed. 1027;

Baker v. *Baker, Eccles. & Co.,* 242 U. S. 394, 61 L. ed. 386.

Point 5.

In order to constitute due process of law, the notice and opportunity to be heard must be required by the state law.

Coe v. *Armour Fertilizer Works,* 237 U. S. 413, 59 L. ed. 1027;

Stuart v. *Palmer,* 74 N. Y. 183, 188, 30 Am. Rep. 289;

Security Trust & S. B. Co. v. *Lexington,* 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87;

Central of Georgia R. Co. v. *Wright,* 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47;

Roller v. *Holly,* 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410;

Louisville & N. R. Co. v. *Central Stock Yards Co.,* 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246.

Point 6.

It is immaterial that the person against whom a judgment is sought would have had no defense if he had been given notice and opportunity to be heard.

Rees v. *The City of Watertown, supra;*

Coe v. *Armour Fertilizer Works, supra.*

Issue VI.

As to the southeast quarter of the southwest quarter of section two (2), township nineteen (19) north, range seven (7) east, the purported leases in this case are void for the reason that they are in contravention of a valid provision of the original homestead patent to Leonard D. Ingram.

Choate, et al., v. *Trapp,* 224 U. S. 665, 56 L. ed. 941;

English v. *Richardson,* 224 U. S. 680, 56 L. ed. 949;

Pollock v. *Farmers' Loan Trust Co.,* 157 U. S. 429, 39 L. ed. 759, 817;

Williams v. *Johnson,* 239 U. S. 420, 60 L. ed. 358.

PRELIMINARY QUESTION.

Since the questions raised herein touch real property and since there are decisions by the Supreme Court of Oklahoma touching these questions, it is well to inquire at the threshold whether this court is precluded from considering any or all of the questions sought to be raised herein. So a preliminary question is: Do the decisions of the Supreme Court of Oklahoma upon any of the questions involved in this case make those questions in this court questions of local law, and thus make it the duty of this court to follow such decisions?

The leading case upon this proposition is:

Kuhn v. *Fairmont Coal Company*, 215 U. S. 349, 54 L. ed. 228,

where the rules in such cases are laid down as follows:

"We take it then, that it is no longer to be questioned that the federal courts, in determining cases before them, are to be guided by the following rules: *1.* When administering state laws and determining rights accruing under those laws, the jurisdiction of the federal court is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts. *2.* Where, *before the rights of the parties accrued,* certain rules relating to real estates have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state. *3. But where the law of the state has not been thus settled,* it is not only the right, but the duty, of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. *4.* So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved,* then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, *even where a different view has been expressed by the state court after the rights of parties accrued.* But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court *if the question is balanced with doubt.*" (Last two italics ours.)

And again in the same case the court says:

> "* * * The federal court is not bound, in cases between citizens of different states, to follow the state decision, if it was rendered *after* the date of the transaction out of which the rights of the parties arose."

The first case decided by the Supreme Court of Oklahoma in which the Oklahoma law with reference to any of the questions involved in this case was attempted to be expounded was decided May 14, 1912, and after all of the purported leases involved in this case had been executed in 1911. This first case was:

> *Duff, et al.*, v. *Keaton, et al.*, 33 Okl. 92, 124 Pac. 291.

None of the Oklahoma cases upon any of the questions involved in this case are, therefore, binding upon this court. It is elementary, of course, that, as to the federal questions raised by relators in this case, the state decisions could not be binding, regardless of when they were rendered, relators not having been parties thereto. This is held in the case of:

> *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed. 896.

ARGUMENT.

Issue I.

The sale of an oil and gas lease is a sale of real property, and the procedure prescribed for the sale of a minor's real estate must be followed.

Point 1.

A lease is an incorporeal hereditament, and an interest in land.

Since the Oklahoma Legislature has passed statutes determining the procedure for the sale of both real property and personal property belonging to a ward, there ought to be little question as to whether the sale of an oil and gas lease on a minor's land should be governed by the statute prescribing the procedure for the sale of either real property or personal property.

> "When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real or personal estate, or some part thereof should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor."
>
> —Paragraph 1467, Comp. Stat. Okla. (1921), (identical with Par. 6555, R. L., 1910).

> "The county judge shall cause copies of said order to be posted up in three public places in the county, one of which shall be at the court house where said hearing is to be held, and personally served on the next kin of the ward and all other persons interested in the

estate of said ward, residing in the county, and to be mailed to all such persons who are not residents of the county, with the postage prepaid, at least fourteen days before the hearing of the petition. If the post-office of any such person is unknown, a copy of the order must be published for two successive weeks in some newspaper published in the county, and the hearing of said petition shall not be less than fourteen days from the date of the first publication of such notice: *Provided*, that if written consent to making the order of sale is subscribed by all persons interested therein and the next of kin, said order of sale may be made at once, and without giving the notice provided for in this section."

—Paragraph 1472 *Id.* (Identical with Par 6559, R. L. 1910).

But the Supreme Court of Oklahoma has confused the issue by creating a new species of property and assigning oil and gas leases on a ward's land to that species.

The Oklahoma Court began by saying that an oil and gas lease is not realty but is personalty. This was the ruling in *Duff* v. *Keaton*, 33 Okl. 52, 124 Pac. 291 (1912). In this case the court was asked to set aside the sale of a lease because the guardian did not comply with the rule for the sale of real property of a ward. To avoid setting the lease aside the court said:

"*2.* A lease granting oil and gas mining privileges for a term of years is a 'chattel real.'

"*(a)* A chattel real is 'personalty'."

In the case of *Papoose Oil Co.* v. *Swindler, et al.*, (1923) 95 Okl. 264, 221 Pac. 506, the court was squarely faced with the necessity of holding that an oil and gas lease was either personal property or real property. But if it was either

the court must set a lease aside which was owned by one of the campanies that was helping to develop the mineral resources of the state. The court straddled and held that an oil and gas lease was *neither personal property nor real property.*

The court said:

> "We conclude that the execution of an oil and gas lease is not a sale of either real estate or personal property."

In passing, one would like to ask what species of property is there that is neither real nor personal?

This problem before the court was free from the subtle, elusive conflicts which sometimes justify an erroneous conclusion. For instance, where an oil lessee attempts to bring ejectment or some other action involving seizin or possession, the court may have a hard case. But in the above cases, and in the case herein, the question was whether a lease was sufficient property to require a formal sale. In oil states, such as Oklahoma, the oil interest is often the chief value in a piece of land. In both of the above cases, the court shows that it is aware of that fact and yet it evades a clear statute which prescribes the method to be followed for the sale of property and creates a new species of property just to give a guardian free rein and presumably to encourage development of the oil resources of the state, for the court says in *Duff* v. *Keaton, supra:*

> "The rule here sought to be invoked would strike down every lease, it matters not how much investment had been honestly made under it, and probably bring about chaotic conditions in the development of one of the great industries of this state."

But the statutes in force when the lease was made provided:

"When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his *real* or *personal* estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor."

—Paragraph 1467, Comp. Stat. Okla. (1921), (Identical with Par. 6555 R. L. 1910).

"To obtain an order for such sale, the guardian must present to the County Court of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale."

—Paragraph 1470, *Id.* (Identical with Par. 6557, R. L. 1910).

"If it appear to the court or judge, from the petition, that it is necessary or would be beneficial to the ward that the real or personal estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, unless notice is waived, as provided in the next section, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward to sell the personal estate or some part of it, the court must order the sale to be made."

—Paragraph 1471, *Id.* (Identical with Par. 6558, R. L. 1910).

"The county judge shall cause copies of said order to be posted up in three public places in the county, one of which shall be at the courthouse where said hearing is to be held, and personally served on the next kin of the ward and all other persons interested in the estate of said ward, residing in the county, and to be mailed to all such persons who are not residents of the county, with the postage prepaid, at least fourteen days before the hearing of the petition. If the postoffice of any such person is unknown, a copy of the order must be published for two successive weeks in some newspaper published in the county, and the hearing of said petition shall not be less than fourteen days from the date of the first publication of such notice: *Provided*, that if written consent to making the order of sale is subscribed by all persons interested therein and the next of kin, said order of sale may be made at once, and without giving the notice provided for in this section."

—Paragraph 1472, *Id.* (Identical with Par. 6559, R. L. 1910).

"The County Court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner and of the next of kin, and of all other persons interested in the estate who oppose the application."

—Paragraph 1473, *Id.* (Identical with Par. 6550, R. L. 1910).

It seems far fetched to argue that the legislators considered an oil and gas lease something besides personalty or realty and failed to make any provision for the sale of such an important part of a ward's land. But if one assumes that the legislators understood that the sale of a lease was the sale of real property, it is natural that no

further provision was made for its sale after they prescribed how a ward's real property could be sold.

This ruling of the Supreme Court of Oklahoma is met on every hand by holdings by the same court to the effect that the sale of an oil and gas lease is the sale of an interest in land and conveys a vested interest in land.

The Supreme Court of Oklahoma held in the case of *Woodworth* v. *Franklin*, (1922) 85 Okl. 27, 204 Pac. at page 458, that an oil and gas lease conveyed an interest in land. The court says:

> "However, it is held in these cases that the right granted by an oil and gas lease is an incorporeal hereditament. By section 4642, Rev. Laws, it is provided that 'the common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma,' and under the common law an incorporeal hereditament could only be created or transferred by grant."

Again the Supreme Court of Oklahoma held a lease to be an interest in real estate in the case of *Bentley* v. *Zelma Oil Co.*, (1919) 76 Okl. 116, 184 Pac. 131. At page 141 speaking of an oil and gas lease which had not been properly executed by a corporation the court says:

> "It was not under the seal of the corporation, nor attested by the secretary thereof; and being an instrument affecting real estate *(Duff* v. *Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472; *Eldred* v. *Okmulgee Loan and Trust Co.*, 22 Okl. 742, 98 Pac. 929; *Allen* v. *Brown*, 6 Kan. App. 704, 50 Pac. 505), and purporting to convey a one-half interest in a lease, affecting real estate, was invalid under section 1187, Rev. Laws 1910, which provides:

> 'Every deed or other instrument affecting real estate, executed by a corporation, except when executed by an attorney in fact, must be attested by the secretary or the clerk of such corporation with the corporate seal attached'."

Again the Supreme Court of Oklahoma held that a lease was property in the case *In re Indian Territory Illuminating Oil Co.*, 43 Okl. 307, 142 Pac. 997.

The same court also held that a lease vests the lessee with "a present vested interest in the land." This seems to be the rule in the following cases:

> *Treese* v. *Shoemaker*, 80 Okl. 235, 195 Pac. 766;
> *Tupeker* v. *Deaner*, 46 Okl. 328, 148 Pac 853;
> *Pluto Oil and Gas Co.*, v. *Miller*, 95 Okl. 222, 219 Pac. 303.

In the case of *Parker* v. *Riley*, (Oklahoma case) (1918 250 U. S. 66, 63 L. ed. 847, a Creek full-blood died leaving a husband and two minors as her only heirs. Under the law of descent each of the heirs took an undivided one-third interest in the fee of the homestead of deceased. One of the children was born after March 4, 1906. By the 9th section of the Act of May 27, 1908, it is provided that the restricted homestead should remain after the death of the allottee "for the use and support of such issue" (born after March 4, 1906) "during their life or lives" until April 26, 1931. The allottee died after this act became effective. Oil was discovered upon the homestead, under a lease made pursuant to the act, said lease being for ten years and as much longer as oil and gas was found in paying quantities (it was an Oklahoma lease). The question arose as to the rights of the child born after March 4, 1906, as

against the other heirs. It was contended that the child born after March 4, 1906, was entitled to all the royalties or to the interest upon all during her life until 1931.

It was held that she was entitled only to the interest, since the royalties were a part of the homestead itself. The court said:

> "These minerals were part of the homestead. * * * Thus the rights of all in the royalties were the same as in the homestead. * * * In this view Julia (the child born after March 4, 1906) is entitled to the use of the royalties, that is to say, the interest or income which may be obtained by properly investing them, during the same period (as she was entitled to the use of the homestead), leaving the principal, like the homestead, to go to the heirs in general on the termination of her special right." (Parentheses ours.)

When the same case was before the Circuit Court of Appeals, 8th Circuit, 1918 (243 Fed. 42, 47), Judge SANBORN said:

> "Oil and gas in the ground are a part of the land, and in this case they were the most valuable part of the land of the lessors. While a lease of such land, granting the exclusive right to find and extract all the oil and gas therein, conveys only that part of the oil and gas which the lessee finds and reduces to possession, and not all the fugacious oil and gas in the land, it nevertheless grants the right and gives the power to the lessee to extract and apply to his own use the most valuable part of the land of the lessors, their oil and gas in their grounds, and when, as here, the execution of such a lease is followed by the discovery and extraction of valuable deposits of oil and gas thereunder; it not only conveys an incorporeal hereditament, but effects the removal from the lessors of the title to the most valuable part of their land, for oil and gas in the ground is a part of the land of the owners of the latter. Such a lease becomes an *alienation* of that

part of the *land* of the lessors which the lessee takes from it, converts into personal property, and appropriates to his own use. * * *" (Italics ours.)

Again the Federal District Court said a lease conveys property. In *Shaffer* v. *Marks,* (1917 E. D. Okla.) 241 Fed. 139, Justice CAMPBELL said:

> "Whether the right conveyed by an oil and gas lease be termed a chattel real, an incorporeal hereditament, or what not, it is nevertheless a right or interest relating to real property, although not arising to the dignity of an estate, and as such right or interest is property, and may be the subject of transfer. The Supreme Court of this state *(In re Indian Territory Illuminating Oil Co.,* 43 Okl. at page 316, 142 Pac. at page 100) said:
>
> > 'Generally, an oil and gas lease, a school land lease, or a lease of any sort for that matter, undoubtedly is property'."

In the case of *Lindley* v. *Raydure,* (1917 E. D. Ky.) 239 Fed. 928 (affirmed 1918), C. C. A., 6th, 249 Fed. 675, the court said (in syllabus No. 2):

> "An oil and gas lease, purporting to convey to the lessee all the oil and gas in the land, and leasing the land to him to drill and operate wells for a specified term and so long thereafter as oil or gas was produced in paying quantities thereon, does not convey a vested interest in the oil and gas, since there can be no ownership of them until they have been reduced to possession, but does convey a vested interest in the right to explore for oil and gas, or an interest in those minerals contingent on their discovery and reduction to possession, and such lease is therefore not executory, but is executed as much as any other lease."

(The above case also refers to *Superior Oil Co.* v. *Mehlin* and *Kolachny* v. *Galbreath,* both Oklahoma cases, decided

in 1910, and both involving specific performance of an oil and gas lease. *They are distinguished.)*

The *Kolachny* case held:

> "Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such a part as the grantee may find, and passing nothing that can be the subject of an ejectment or other real action."

In the case of *Downey* v. *Gooch,* (1914 E. D. Okla.) 240 Fed. 527, the court said, in distinguishing the *Superior Oil Co.* and *Kolachny* v. *Galbreath* cases, that they were found to be so unconscionable a court of equity would not enforce them.

The court says near the end of its opinion:

> "So far as the Oklahoma cases cited establish rules of property, I consider them binding on this court. So far as they announce the view of that court upon certain equitable principles, involved, they are, like all other respectable authorities, persuasive, but not binding upon the federal court. It will be noted that Judge Williams, in *Kolachny* v. *Galbreath,* expressly refrained from determining whether the option expressed in the lease under consideration would be valid at law. * * *"

The court granted an injunction against such subsequent lessees and lessors which was equivalent to specific performance: thus virtually overruling the above cases.

The above case seems to be followed by the Supreme Court of Oklahoma in the cases of:

Barnes v. *Keyes,* 36 Okl. 6, 127 Pac. 261;

Strawn, et al., v. *Brady, et al.,* 84 Okl. 66, 202 Pac. 505.

In the case of *Woodworth* v. *Franklin, supra,* the court says:

> "The words 'land,' 'real estate' and 'premises,' when used herein or in any instrument relating to real property, are synonyms and shall be deemed to mean the same thing, and unless otherwise qualified, to include lands, tenements and hereditaments; and the word 'appurtenances' unless otherwise qualified shall mean all improvements and every right of whatever character pertaining to the premises described."

In the case of *Rich* v. *Doneghey,* (1918) 177 Pac, at page 89, the Supreme Court of Oklahoma makes such a clear statement of the questions involved in arriving at the nature of an oil and gas lease, we shall quote at length from it:

> "In the consideration of the questions presented it will perhaps prove helpful if notice be first taken of the rights of the lessee created by the written instrument in question. At the time of its execution the plaintiffs were the owners in fee simple of the land. By virtue of such ownership they had, on account of the 'vagrant and fugitive nature' of the substances constituting 'a sort of subterranean *ferae naturae*' *(In re Indian Territory Ill. Oil Co.,* 43 Okl. 307, 142 Pac. 997), no absolute right or title to the oil or gas which might permeate the strata underlying the surface of their land, as in the case of coal or other solid minerals fixed in, and forming a part of the soil itself. *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729.
>
> "But with respect to such oil and gas, they had certain rights designated by the same courts as a qualified ownership thereof, but which may be more accurately stated as exclusive right, subject to legislative control against waste and the like, to erect structures on the surface of their land, and explore

therefor by drilling wells through the underlying strata, and to take therefrom and reduce to possession, and thus acquire absolute title as personal property to such as might be found and obtained thereby. This right is the proper subject of sale, and may be granted or reserved. *Barker* v. *Campbell Ratcliff Land Co., et al.*, 167 Pac. 468, L. R. A. 1918 A. 487. The right so granted or reserved, and held separate and apart from the possession of the land itself, is an incorporeal hereditament; or more specifically, as designated in the ancient French, a *profit a' prendre*, analogous to a profit to hunt and fish on the land of another. *Kolachny* v. *Galbreath*, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N.S.) 451; *Funk* v. *Haldeman, et al.*, 53 Pa. 229; *Phillips* v. *Springfield Crude Oil Co.*, 76 Kan. 783, 92 Pac. 1119. Considered with respect to duration, if the grant be to one and his heirs and assigns forever, it is of an interest in fee. *Funk* v. *Haldeman, supra.* An interest of less duration may be granted, and that for a term of years has been denominated by this court a chattel real. *Duff* v. *Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472. Such right is an interest in land. 14 Cyc 1144; *Heller* v. *Dailey*, 28 Ind. App. 555, 63 N. E. 490. If granted in the homestead of the family, the wife must join in the conveyance. *Carter Oil Company* v. *Popp*, 174 Pac. 747. A grant thereof is an alienation within the meaning of the Acts of Congress removing restrictions *(Eldred* v. *Okmulgee Loan & Trust Co.*, 22 Okl. 742, 98 Pac. 929), or imposing restrictions *(Parker* v. *Riley*, 243 Fed. 42, 155 C. C. A. 572), on the alienation of allotted Indian land, and is a conveyance within the meaning of section 9, Act Cong. May 27, 1908, c. 199 (35 Stat. 315), providing that 'no conveyance of any interest of any full-blood Indian heir' in land inherited from any deceased allottee of the Five Civilized Tribes, shall be valid unless approved by the County Court. *Hoyt* v. *Fixico*, 175 Pac. 517 (decided Oct. 8, 1918).

"Bearing these principles in mind, it will at once

be seen that by this instrument the plaintiffs granted to the defendant a present vested interest in their land. *Brennan* v. *Hunter*, 172 Pac. 49; *Northwestern Oil & Gas Co.*, v. *Branine*, 175 Pac. 533 (decided Oct. 8, 1918). That is, the right for at least five years of mining and operating thereon for oil and gas, which included, of course, the right to explore therefor, and to extract therefrom and reduce to possession, as their personal property, such as may be found. In other words, it was a grant of the exclusive right, for the time specified, to take all the oil and gas that could be found by drilling wells upon the particular tract of land, with the accompanying incidental right to occupy so much of the surface as required to do those things necessary to the discovery of and for the enjoyment of the principal right so to take oil or gas. No more nor greater right, except perhaps as to duration, with respect to oil and gas, could be granted. Although there had been in terms a purported conveyance of all the oil and gas in the place, yet, by reason of the nature of these substances, no title thereto or estate therein would have vested, but only the right to search for and reduce to possession such as might be found; and when reduced to possession, not merely discovered, title thereto and an estate therein as corporeal property would vest. *Kolachny* v. *Galbreath, supra; Frank Oil Co.* v. *Belleview Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N.S.) 487; *Hill Oil & Gas Co.* v. *White*, 53 Okl. 748, 157 Pac. 710. Though denominated a lease, and in deference to custom will be so referred to herein, the instrument before us, strictly speaking, is not such, but is in effect a grant *in praesenti* of all the right to the oil and gas to be found in the lands described with the right for a term of five years to enter and search therefor, and if found, to produce and remove them, not only during said term, but also as long thereafter as either is produced, and to occupy so much of the surface of the land as may be necessary for the purpose of exploration or production, or both."

Again:

> "The words 'real property' are coextensive with lands, tenements and hereditaments." *Woodworth* v. *Franklin*, *supra*.

Again we suggest that as far as the application of the procedure for the sale of property goes there can be no doubt that an oil and gas lease is a sale of real property. The Oklahoma court cites cases where specific performance was asked or ejectment brought (both of which would probably be predicated on present vested interests) and because such cases have held that there isn't sufficient corporeal property to found ejectment or specific performance on, the Oklahoma court says there isn't property in a lessee. The court is further led astray by the roving nature of oil and gas. Because they share this character with wild animals, the Oklahoma court assumes that they are identical with wild animals. This is clear error. For this court pointed out in *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729, that there is an analogy between gas and wild animals but not an identity. Had the Oklahoma court not reasoned from that false premise it would have arrived at the conclusion that "an oil and gas lease is a conveyance of a present vested interest in land, creating an estate for years."

Not only has the Oklahoma Supreme Court held that an oil and gas lease conveys an interest in land but the rules requiring certain formalities for the transfer of real property have been strictly applied to leases. *Bentley* v. *Zelma Oil Co.*, *supra*.

Other jurisdictions hold that a lease conveys an interest in real estate. In the case of *Appeal of Stoughton*, 88 Pa. St. Rep. 198, the question of the nature of a sale by

a guardian of an oil and gas lease was before the court. Holding that it was a sale of a part of the realty and subject to the rules relating to such sales, the Supreme Court of Pennsylvania said:

> "A guardian has power, ordinarily, to lease any of his ward's property that is of such character as makes it the subject of lease, but without the approval of the orphan's court he cannot dispose of any part of the realty; * * * Oil is a mineral, and being a mineral, is a part of the realty. * * * Whenever conveyance is made of it, whether the conveyance be called a 'lease' or a 'deed' it is, in effect, the grant of part of the corpus of the estate, and not of the mere incorporeal right. In the case above cited this is said to be so as to leases of coal land for mineral purposes, and there is no reason why the same doctrine should not apply to oil leases."

This case was quoted from approvingly, and followed by the Supreme Court of West Virginia, in the case of:

Wilson, et al., v. *Youst*, 28 S. E. 781,

where it was held that a life tenant was entitled to only the interest upon the royalty received under an oil and gas lease. Quoting from Gould on Waters. Sec. 291, the court said:

> "A lease of land, for the purpose of mining oil, coal, rock or carbon oil, passes a corporeal interest which is the proper subject for action of ejectment; and a proportionate share of the oil to be produced by an oil well is an interest in land, a parol sale of which is void under the statute of frauds."

The court also quotes with approval the quotation given above from *Appeal of Stoughton.*

The Supreme Court of Texas determined as to whether or not an oil and gas lease is personalty instead of real-

ty even more distinctly and clearly than the above quoted case. The Texas case says:

> "An oil and gas lease conveys an interest which is as valid and as substantial as any interest conveyed in property general."
>
> —*American Refining Co.* v. *Tidal Western Oil Co.*, 264 S. W. 335.

In the *American Refining Company* v. *Tidal Western Oil Co.*, (Court of Civil Appeals, Texas, May 14, 1924) 264 S. W. 335, the facts were about as follows: Defendant in error, Tidal Company, brought suit for damages and for an injunction restraining the Refining Company from interfering with the right of the Tidal Company, to take casinghead gas; $50.00 damages awarded and injunction issued. Tidal Company alleged that it was successor to one Snedden who entered a casinghead contract with the IXL Oil Company, covering about three acres of land. The Refining Company was successor to the lessee of the IXL Company, under a lease in the usual 88 form. The Refining Company contends that it is not bound by the casinghead contract under which the Tidal Company claims, for the reason that it was not a covenant running with the land, but was only personalty. (Case was affirmed.)

Upon the above facts Mr. Chief Justice HALL gave the following opinion:

> "In our opinion the contract is not susceptible to the construction placed upon it by the plaintiff in error, nor will the facts sustain the contention. It is settled law in Texas that oil and gas are minerals, and while in place are part of the realty, and one who acquires an interest in them by proper conveyance has a legal estate and interest in the land under which they are situated."

A Federal Court in Illinois denied relief to a lessee seeking to protect his interest from a subsequent lessee who got a lease while the first lease was valid. The Supreme Court of the United States, in *Guffey* v. *Smith*, 237 U. S. 101, 59 L. ed. 856, reversed the lower court. The court said:

> "Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even to enforce an executory promise in a lease already given, but to protect a present vested leasehold, amounting to a freehold interest, from continuing an irreparable injury calculated to accomplish its practical destruction. The complaint is not that performance of some promised act is being withheld or refused, but that complainants' vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief. In this respect the case is not materially different from what it would be if the complainants were claiming under an absolute conveyance rather than a lease."

To the same effect are many cases in other jurisdictions:

United States v. *Midway No. O. Co.*, (1916 S. D. Calif.) 232 Fed. 619;

Isom v. *Rex Crude Oil Co.*, (1905) 147 Calif. 659, 82 Pac. 319;

Kahle v. *Crown Oil Co.*, (1913) 180 Ind. 131, 100 N. E. 681;

Campbell v. *Smith*, (1913) 180 Ind. 159, 101 N. E. 89;

Bryson v. *Crown Oil Co.*, (1916) 185 Ind. 156, 112 N. E. 1;

New Domain O. & G. Co. v. *Mckinney*, (1920) 188 Ky. 183, 221 S. W. 245;

Barnes v. *Winona Oil Co.*, (1921) 83 Okl. 253, 200 Pac. 985;

Zelma Oil Co. v. *Nemo Oil Co.*, (1921) 84 Okl. 217, 203 Pac. 203;

Duffield v. *Rosenweif*, (1891) 149 Pa. 520, 23 Atl. 47;

Bender v. *Brooks*, (1913) 103 Tex. 329, 127 S. W. 168;

Bettman v. *Harness, supra*, note E, 36 L. R. A. 566;

Haskell v. *Sutton*, (1903) 53 W. Va. 206, 44 S. E. 533;

Pittsburgh Gas Co., (1919, W. Va.) 100 S. E. 296, 7 A. L. R. 901.

In a recent case, *Lynch* v. *Alworth-Stephens Company*, 69 L. ed. 295 (U. S. Mar. 16, 1925) this court said:

> "It is, of course, true that the leases here under review did not convey title to the unextracted ore deposits (*United States* v. *Biwabik Min. Co.*, 247 U. S. 116, 123, 62 L. ed. 1017, 1020, 38 Sup. Ct. Rep 462); but it is equally true that such leases, conferring upon the lessee the exclusive possession of the deposits and the valuable right of removing and reducing the ore to ownership, created a very real and substantial interest therein. See *Hyatt* v. *Vincennes Nat. Bank*, 113 U. S. 408, 416, 28 L. ed. 1009, 1012, 5 Sup. Ct. Rep. 573; *Ewert* v. *Robinson*, 35 A. L. R. 219, 289 Fed. 740, 746, 750. And there can be no doubt that such an interest is property. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155; *Bryan* v. *Kennett*, 113 U. S. 179, 192, 28 L. ed. 908, 912, 5 Sup. Ct. Rep. 407."

And again, on page 298 it is said:

> "It is said that the depletion allowance applies to the physical exhaustion of the ore deposits, and since the title thereto is in the lessor, he alone is entitled to make the deduction. But the fallacy in the syllogism is

plain. The deduction for depletion in the case of mines is a special application of the general rule of the statute allowing a deduction for exhaustion of property. While respondent does not own the ore deposits, its right to mine and remove the ore and reduce it to possession and ownership is property within the meaning of the general provision. Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same mines is likewise lessened. There is exhaustion of property in the one case as in the other; and the extent of it, with the consequent deduction to be made, in each case, is to be arrived at in the same way; namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market value of the product, and allocating that amount in proportion to the interest of each, severally considered."

Can any one doubt that the interest conveyed by a lease is sufficiently property to make it necessary for a guardian to comply with the procedure for the sale of real property of a ward?

When applied to leases the word "license" was used merely to distinguish between cases where the oil was sold in place and cases where only the right to find and take was granted. The Oklahoma court adopted the term, but ignored the distinction. Mr. Tiffany, in his text cited above on Real Property, says, at page 746:

> "Frequently the term 'license' is applied to all rights to take minerals, although created by instruments sufficient for the conveyance of an incorporeal interest in land, and intended to have such an effect, the term being in fact used merely to distinguish such a grant of a right to mine from a grant of the minerals in place. The term 'license,' when so used, however, is not appropriate to describe the right of the person en-

titled, since to the license to dig for the minerals is joined the right to take them away when dug, and he consequently has a *profit a' prendre*, without any of the incidents of a mere license."

A *profit a' prendre* is real estate. Vol. III, Bouvier's Law Dictionary, page 2736.

Finally, we submit that whatever the difference of opinion as to whether a lease passes an inchoate or a vested interest, it passes an interest in real property that is governed by the law of real property, and must be considered real property for the purposes of this case. As to the contrary holding of the Supreme Court of Oklahoma, this court is not bound for the reasons set out above.

Point 2.

The sale of an oil and gas lease on a ward's land should be governed by the law providing for the sale of real property.

The procedure prescribed by the Statutes of the State of Oklahoma for the sale of a minor's property was not followed in this case, and said leases are therefore void.

The Statutes of Oklahoma (1921), sections 1470-1471-1472 and 1478, all quoted above, and the following quoted statutes, provide that notice is necessary if an oil and gas lease is real property; section 1263, which is identical with section 6367, R. L. 1910, provides:

> "If claims against the estate have been allowed, and a sale of property is necessary for their payment, or for the payment of the expenses of administration, or of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the

hearing of the application, either by posting notices or by advertising. He may also make a similar application, either in vacation or term, from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appears for the best interest of the estate, he may, at any time after filing the inventories, in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, remaining and not set apart, whether necessary to pay debts or not."

—Section 1263, Comp. Okla. Stat. (1921).

And section 1266 (1921) (same as 6370, R. L. 1910):

"The sale of personal property must be made at public auction, and after public notice given for at least fifteen days by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold; unless for good reasons shown the court or judge orders a private sale, or a shorter notice. Public sales of such property must be made at the courthouse door, or at the residence of the decedent, or at some other public place, but no sale shall be made of any personal property which is not present at the time of sale, unless the court or judge otherwise orders."

And section 1279 (1921) (same as 6383, R. L. 1910):

"When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county; if none, then in such paper as the court may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will

be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the judge of the County Court to which the return of the sale must be made, at any time after the first publication of notice, and before the making of the sale. If it is shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order."

These sections apply to sale of minor's property.

—Section 1478, Compiled Oklahoma Statutes, 1921.

That notice for the sale of real property is necessary, is recognized by the Supreme Court of Oklahoma in the recent case of *Papoose Oil Co.* v. *Swindler, et al., supra*, where it is held that an oil and gas lease is neither real property nor personal property.

The same court, in a whole string of cases, has held that an oil and gas lease conveys an interest in land, and is property. Yet, it is neither real property nor personal property!

There is little doubt but that the sale of an oil and gas lease is, upon principle and the great weight of authority, a sale of real property and subject to the usual rules of real property. To say that it is not real or personal property, does not make it less so.

Tiffany on Real Property, volume 1, page 520, section 222, says:

> "Generally speaking, an instrument granting mineral or mining rights is subject to the same principles as other conveyances of interests in land."

Instead of the presence of this peculiar definition of an oil and gas lease being in the minds of the legislators, causing them to omit leases from the statutes, it seems more reasonable to infer that the omission of leases from the statutes is evidence that the legislators were not aware of this *difference*, whatever this *difference* might mean. But everyone will admit that the property, relationship, license or interest (by whatever name called) granted, created or passed by a lease, is valuable. It was the policy and intention to control and protect everything of value belonging to the ward. The legislature provided for the sale of *real property*, and for the sale of *personal property*. In Anglo-American Law, *real property* and *personal property*, collectively, embrace all valuable relationships pertaining to lands and things. Is it reasonable to assume that the lawmakers intended to give this thing of value such an anomolous classification without expressly declaring the intention and without in any manner providing for its protection?

But if it is still insisted that the legislators did not intend to include leases under the provision for the sale of a minor's real property, then since they did not provide for the sale of leases, we must assume that they did not mean that they should be sold.

Issue II.

The appointment of a guardian for the person and property of Leonard D. Ingram in this case was void under the laws of the State of Oklahoma, for the reason that no notice was given of the hearing of the application for the appointment.

In the instant case the judge of the County Court of Wagoner County, Oklahoma, set the application for the appointment of a guardian for the person and estate of the appellant, Leonard D. Ingram, down for hearing on January 3rd, *1911* (R. 14-15), and directed "that notice thereof be given by posting notices in three public places in said Wagoner County, one of which shall be at the front door of the courthouse in Wagoner." The notice posted was for a hearing to be had on January 3rd, *1910*. This, of course, was no notice at all.

> "To name an impossible day is equivalent to naming no day at all, and such an omission renders the notice, not merely defective, but no notice at all."
>
> —*Cummings, et al.*, v. *Landes, et al.*, 140 Iowa 80, 117 N. W. 22.

To the same effect are the following cases:

Spence v. *Morris*, (Ct. Civ. App., Texas) 28 S. W. 405;

Lyon v. *Vanatta, et al.*, 35 Iowa 521.

When the record shows one kind of notice, and that one is void, no other notice can be presumed from the judgment of the court.

—*Beachy, et al.*, v. *Shomber*, 73 Kan. 62, 84 Pac. 547.

That notice is a jurisdictional prerequisite to the valid appointment of a guardian, is the established doctrine of the Supreme Court of Oklahoma. In the case of *Ross* v. *Breene*, 88 Okl. 37, 211 Pac. 417, Mr. Justice BENNAMER, speaking for the Supreme Court of Oklahoma, held:

> "But the rule is well established that as a prerequisite to the validity of an appointment of a guardian, the jurisdictional facts must exist, * * *. Notice of the hearing on the application for the appointment as required by statute must be given, and failure to give such notice is fatal to the jurisdiction of the court to make a valid appointment. *McIntosh* v. *Holtgrave, et al.*, 79 Okl. 63, 191 Pac. 739. *This is true, although the statute only provides such notice to be given as the judge shall direct.*" (Italics ours.)

In this case the judge directed that notice be given of a hearing to be had on January 3, *1911*; the notice given was a hearing to be had January 3, *1910*, an impossible day. The jurisdictional notice was, therefore, not given, and this failure, under the case of *Ross* v. *Breene, supra*, was fatal to the power of the court to make a valid appointment.

In the more recent case of *Mullin* v. *Hawkins*, 97 Okl. 30, 222 Pac. 697, the Supreme Court of Oklahoma held as follows:

> "We think that proper notice or nomination is a jurisdictional element and without it the appointment of guardian is unauthorized and void."

Issue III.

Under the state law (on principle) the guardian has no power to execute and the County Court no power to approve a lease beyond the minority of a ward.

Point 1.

The County Court is a court of limited jurisdiction and has only such power as is expressly granted by the Constitution and Statutes.

In the case of *In re Bolin's Estate*, 22 Okl. 851, 98 Pac. 934, it is held:

> "The jurisdiction of the courts of probate is not inherent * * *. Such courts are purely creatures of statute, with certain limited statutory powers which must be strictly construed."

To the same effect is the holding in the following cases:

Garrett v. *London, etc., Ins. Co.*, 15 Okl. 222, 81 Pac. 421;

Starkweather v. *Kemp*, 18 Okl. 28, 88 Pac. 1045;

Rust v. *Gillespie*, 90 Okl. 59, 216 Pac. 480;

Seifert v. *Seifert*, 82 Okl. 230, 200 Pac. 243.

The early law, both in England and this country, with reference to the power of a guardian to lease lands of his ward, is laid down in Vol. 9, American & English Encyclopedia of Law, page 115, as follows:

> "He (the guardian) may lease the ward's lands for the term of his guardianship. Any excess in a lease beyond that term will be void at the election of his successor or of the ward on becoming of age."

Citing the following cases:

Rex v. *Oakley*, 10 East. 494;

Emerson v. *Spicer*, 46 N. Y. 594;

Clark v. *Burnside*, 15 Ill. 62;
Richardson v. *Richardson*, 49 Mo. 29;
Magruder v. *Peter*, 4 Gill & J. (Md.) 323;
Snook v. *Sutton*, 5 Halst L. (N. J.) 133;
Willis v. *Cowles*, 4 Conn. 189;
Alexander v. *Buffington*, 66 Iowa 360;
Ross v. *Gill*, 4 Call (Va.) 250.

The note *(Id.* 115) also says:

> "Formerly the excess avoided the whole lease." (Bac. Abr. Leases I; 2 Kent. Com. 228.)

In Vol. II, Bouvier's Law Dictionary, page 1394, it is said that at common law the guardian had no power to lease a ward's land beyond minority:

> "But if the lease extended beyond the minority of the ward, the latter may avoid it on coming of age; *Genet* v. *Tallmadge*, 1 Johns Ch. (N. Y.) 561; *Jones* v. *Ward*, 10 Yerg. (Tenn.) 160; *Snook* v. *Sutton*, 10 N. J. L. 133."

Point 2.

The Constitution and Statutes do not give the County Court power, through a guardian or otherwise, to lease a ward's land beyond minority.

In the case of *Strawn, et al.*, v. *Brady, et al.*, 84 Okl. 66, 202 Pac. 505, Mr. Justice KENNAMER, speaking for the Supreme Court of Oklahoma, and quoting from the case of *Byerly* v. *Eadie, et al.*, 95 Kan. 400, 148 Pac. 757, held:

> "The statute limits the jurisdiction of probate courts to the estates of persons who are dead, or who are minors or persons of unsound mind. It has no jurisdiction over the estate of a living person except the person be a minor or of unsound mind."

In the case of *Cochran* v. *Techee,* 40 Okl. 388, 138 Pac. 563, it is said:

> "It is fundamental, and the statutes of this state (sections 4951, 4952, Compiled Laws, 1909) provided that where a guardian is appointed solely because of his ward's minority, his power is superseded by the attainment of his ward of majority."

And in the recent case of *Haddock* v. *Bronaugh,* 92 Okl. 197, 218 Pac. 848, the Supreme Court of Oklahoma held that a guardian had no power to execute, and the County Court no power to approve, a lease for agricultural purposes of his ward's land for a period extending beyond the minority of the ward, and that the lease was void beyond the minority of the ward. The court based its decision squarely upon "the lack of authority in the Constitution and Statutes thereunto."

The reasoning of the case of *Cabin Valley Mining Co.* v. *Hall,* (1916) 53 Okla. 760, 155 Pac. 570, was that, since no limitation was placed upon the time for which a guardian might lease his ward's lands, the legislature must be presumed to have intended to give an unlimited power. But there is likewise no limitation put upon the power of the guardian to lease for agricultural purposes, and in the *Haddock* case the Supreme Court of Oklahoma says:

> "Probate courts have no common-law jurisdiction, but the nature, extent, and exercise of their jurisdiction depend on the terms of the constitutional or statutory grant. They cannot exercise any powers other than those which have been expressly conferred upon them, or which are necessarily implied from those expressly conferred; and their powers are not to be extended by construction or by unnecessary implication."

The same power is granted to lease for agricultural purposes, as is granted to a guardian to lease for oil and gas purposes. And there is absolutely no distinction on principle between an oil and gas lease to extend beyond the minority of a ward, and an agricultural lease for such a period.

In the case of *Carlile* v. *National Oil and Development Co.*, (1921) 83 Okl. 217, 201 Pac. 383, the Supreme Court of Oklahoma had this to say of the *Cabin Valley Mining Co.* case, *supra,* which was the first case holding that the County Court had power to extend a lease beyond the minority of a ward:

> "The court, in the cited case, after laying down the proposition that County Courts in this state were courts that procured their power solely from the Constitution and Statutes of the state, and then, after citing a few of those statutes, and a few provisions of the Constitution applicable to County Courts, then took up a discussion of the powers of equity courts in handling the estates of minors and others under disability, seemingly with a view of arriving by analogous reasoning to the conclusion that the Statutes and Constitution of our states gave the same powers to our County Courts."

Both the *Cabin Valley* case, *supra,* and the *Duff* v. *Keaton* case, *supra,* hold that there was no provision in the statutes limiting the guardian's power in the sale of an oil and gas lease on a minor's land. The Supreme Court then reasons that the general provisions for administering the estates of minors must grant this power by intendment. The error lies in assuming that larger powers can be inferred than are necessary. The law is settled in Oklahoma to the effect that a guardian's power ends when a ward reaches his majority. *Cochran* v. *Teehee, supra.* How can

it fairly be assumed that the guardian gets power by intendment to lease beyond minority? That is equivalent to saying that a lease cannot be made except beyond minority; for, if in any case it is possible to lease for minority only, there can be no inference of power to lease beyond the period of his appointment because he has power to lease. If any inferences are justifiable, they are of power to administer during minority. The Oklahoma court reaches an erroneous conclusion and makes it in turn a reason. The court concludes that by intendment the guardian gets power to control a minor's property beyond minority and then reasons that this is proof that a guardian can lease beyond minority.

Issue IV.

If the law of Oklahoma gives the County Court authority through a guardian to lease a minor ward's land beyond minority, the law is unconstitutional because it takes property without due process.

Point 1.

A sane adult citizen is entitled to the unrestricted use and control of his land.

Let us now consider the constitutional authority of the state, through the County Court and a judicial guardian, to take the control and dominion of his property while he is a minor from one person and give it to another for an indefinite period beyond the minority of such person (in this case as long as the property is of any value).

In this connection let us bear in mind that Leonard D. Ingram did not receive any notice and was not given any opportunity to be heard at any stage of the proceedings

under which the alleged guardian was appointed and the purported leases were made. Nor was any attempt made to serve any notice upon said Leonard D. Ingram, nor any pretense of an opportunity to be heard given.

In the case of *Chicago, Burlington & Quincy Railroad Company* v. *City of Chicago*, 166 U. S. 226, 41 L. ed. 979, 984, it is said:

> "But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. *In determining what is due process of law, regard must be had to substance, not to form.*" (Italics ours.)

In the case of *Buchanan* v. *Warley*, 245 U. S. 60, 62 L. ed. 149, 161, the Supreme Court held:

> "The Federal Constitution and laws passed within its authority are, by the express terms of that instrument, made the supreme law of the land. The 14th Amendment protects life, liberty, and property from invasion by the states without due process of law. *Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden* v. *Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383. *Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land.* 1 Cooley's Bl. Com. 127." (Italics ours.)

In the case of *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed. 896, it is held:

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

And again:

"Their jurisdiction (probate courts) in this respect being limited to the estates of deceased persons, *they have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind.* * * *" (Italics ours.)

(The Supreme Court then proceeds to hold that an attempt by the courts of the State of Washington to administer upon the estate of a living adult without notice to him, was a denial of due process and void under the 14th Amendment.)

Under these decisions of the Supreme Court may a state, through its agency, the County Court and a judicial guardian, without any notice of any kind or at any time to the person whose property is involved, appoint a guardian for such person, authorize such guardian to execute an oil and gas mining lease for a period during the alleged minority of such person, "and as much longer thereafter as oil or gas is found in paying quantities," and bind such person *vel non* by such lease?

We have been able to find only one case discussing this particular question. (The Oklahoma courts have never passed on the constitutional question, but base their decision on the question of expediency.)

In the case of *Tiernay Coal Co.* v. *Smith's Guardian*, 180 Ky. 815, 203 S. W. 731, a Kentucky statute was before the Court of Appeals of that state, which statute provided in part as follows:

> "That the guardian of an infant curator or the committee of a person of unsound mind may lease the real estate, or any interest therein, of such infant or person of unsound mind, for the purpose of mining and removing all or part of the coal, oil, gas and any or all other mineral or mineral substances and products therein; * * * Such lease may be for such length of time as the guardian, curator or committee may approve, without being limited to the time at which the disability of such infant or person of unsound mind may be removed."

Pursuant to this statute and with the approval of the proper court, a guardian attempted to lease a minor's land for coal mining purposes, in consideration of the payment of royalty, for a period of forty years with the privilege of renewal for forty years. The sole question before the court was the constitutionality of such lease and the statute pursuant to which the lease was attempted to be made. We shall quote at length from the opinion of Mr. Justice CARROLL upon this point:

> "In the Bill of Rights, among the great and essential principles of liberty and free government, we find it declared that:
>
> > 'All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned, * * * the right of seeking and pursuing their safety and happiness. * * * The right of acquiring and protecting property. * * * Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. * * * Nor can he be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land. * * * No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied

to public use without the consent of his representatives, and without just compensation being previously made to him.'

"These provisions of the bill of rights which will be found in every constitution of the state bear striking testimony to the high regard in which the people of the state have always held the right to acquire, enjoy and dispose of property. They placed it in the same class with life, and liberty, and surrounded its use and enjoyment with the same safeguards."

"Keeping now in mind the exacting care with which constitutions and courts have guarded the right of the citizen from any attempt to interfere with his exclusive enjoyment of property owned, we may stop here a moment to have clearly before us just what this Act of 1916, does, as exhibited in the case we have. Here are three infants, one 11, the other 16, the other 18 years of age; they own the fee-simple title subject to a life estate, in a body of land in one of the great coal-producing counties of the state, the value of the coal in which, we may say without exaggeration, is many millions of dollars. One of these infants in about two years from now will have reached his majority, the other in about four years, and the other in about nine years, at which time each of them, free from any restraints, except those imposed by the judgment of the Pike Circuit Court, would come into the full possession and enjoyment of this enormously valuable body of land, and each of them when he had reached his majority, would have the undisputed right to manage, control, and enjoy it to the same extent as any other adult citizen of sound mind in the state would have the right to manage, control and enjoy his property. But if the judgment stands, Jake, when he reaches his majority in two years from now, and when he might reasonably expect to come into the possession and enjoyment of his estate like any other citizen, will find that shortly before he arrived at age the Circuit Court of Pike County had leased his

land, or at least the only valuable part of it, for a term of forty years, with the privilege on the part of the lessee to extend the lease for forty years, so that Jake, if he lived to be a centenarian, would at the end of his life come into the full possession of his estate for the first time. It is, however, probable, if not certain, that he would never live to see the day when he would come into the use and possession of this property given to him in his infancy. It is, of course, true that he will derive from it each year a valuable income, but this falls far short of the exclusive dominion that every adult citizen of sound mind desires to and should have the high privilege of exercising over his own property.

"And entirely aside from the constitutional prohibitions against its exercise, it seems to us an intolerable situation that the legislature of the state should have the power, through the instrumentality of the court, to take from a person, in his infancy, for the full period of his life, the right to the use and enjoyment of property that except for this he would come into the full possession of when he reached his majority, and viewed in the light of the constitutional guaranties referred to it would be folly to say that the citizen has the inalienable right to acquire, hold, and enjoy property, if by legislative declaration it may be taken from him in the manner attempted in this case. The declaration by which the right of the citizen to exercise dominion over his property were permanently secured would have little meaning if he could be deprived of its control and possession by the decree of a court, pursuant to a legislative enactment like the one here in question. Everybody will readily admit that the legislature could not, by any enactment, take from an adult citizen of sound mind the right to control and manage his property, although it should be said that such exercises of arbitrary power have been attempted more than once, but in every instance the efforts were met and set aside by judicial authority."

"But it is said that this legislation only operates

on the property and affects the rights of infants and persons of unsound mind. In a limited sense that is true, and there could be no objection to the legislation if its course was stopped when the disability of the person affected was removed. But, as we have seen, it does not stop there; it continues to restrain his rights, to deprive him of his property, and deny him the exercise of acts of ownership over it after the disability is removed to the same full extent that it does during the continuance of the disability. Nor can it be said that because courts of equity have always exercised the power within the limitations prescribed by the Code to sell the lands of infants and persons of unsound mind, thereby divesting them completely of title thereto, there is no substantial difference between that method of taking from the infant, or person of unsound mind, his estate and the method employed by leasing it in the manner authorized by this legislation.

"The difference between the sale of infant's land for purposes of reinvestment, or for his education and maintenance, and the leasing of it for a period of time long beyond his infancy, is so obvious that it scarcely need be distinguished. When the land of an infant is sold for purposes of reinvestment, there is only a change in the character or, perhaps, the location of his estate. The principal fund remains intact to come into his possession when he reaches his majority. If his estate is sold for his education and maintenance, during infancy, only so much of it as may be necessary for this purpose can be sold or, if more, it will be reinvested in other property over which he will have exclusive dominion and control when the period of his minority is over. When, however, the whole estate is seized during his infancy, and at a time when he is presumed to be incapable of acting for himself, and leased for a term of years that will, under ordinary conditions, extend far beyond the period of his life, the legislature, through the instrumentality of the court, is assuming to exercise a guardianship for life over his affairs that

is only tolerated in cases of infancy and mental unsoundness.

"There could scarcely be conceived any legislation that would be more obnoxious to the constitution or offensive to the instincts of vigorous men than to make them, by legislative action and without their consent, the beneficiaries for life of the bounty of a lessee to whose keeping their estates had been committed."

"We have, however, discovered some authority holding a contrary view to that herein expressed, and to this authority some reference should be made."

(Here the court refers to the cases of:

Cabin Valley Mining Co. v. *Hall,* 53 Okl. 760, 155 Pac. 570;

Mallen v. *Ruth Oil Co.,* 231 Fed. 845;

Ricardi v. *Gaboury,* 115 Tenn. 485, 89 S. W. 98;

Beaucamp v. *Bertig,* 90 Ark. 350, 119 S. W. 75;

McCreary v. *Billing,* 176 Ala. 314, 58 South. 311;

and proceeds as follows:)

"In all of these cases it would seem that the court was influenced to give its approval to a lease of infants, or interest therein, that would extend far beyond the minority of the infant, upon the ground that the best interests of the infant would be promoted by the lease. * * * It is, of course, well enough that the best interests of the infant should be the sole guide in the leasing and disposition of his estate by the court, but its superintending and supervising jurisdiction and authority should end with the infancy. These courts, in the opinions referred to, have not only undertaken to control the estate during infancy but for many years thereafter, and it would seem, as we have before said, that there is little, if any, difference between leasing the land of a young man of 18 years for 99 years and leasing the land of a young man of 21 years for 96 years. * * * It should however, be observed that in no

one of these cases was any reference made to constitutional provisions prohibiting courts from exercising authority or control over the estates of adults, although it might be thought beneficial or helpful to the adult to have the management of his property taken out of his hands."

"It may be true, as said in these cases, that the interest of the infant would be benefited by the execution of a lease extending beyond his minority in the sense that he might during infancy be able to realize a larger income from the lease than he would get if it terminated with his minority, and it may be true that the arrangement would yield to him, after reaching manhood, a greater financial profit than he could realize from it by his own endeavors. But considerations like these should, as we think, have little weight in determining what our judgments should be. The guardianship of the courts should be confined to persons under disability, and therefore presumed to be unable to protect themselves, and all others should be left to their own endeavor, whether it means success or failure. This is the spirit of a constitution that speaks the best judgment and wisdom of the ages, and its directions should not be set aside or ignored to promote the personal convenience or advantage of the individual."

"Upon a careful consideration of the question involved, we think the Act of 1916, insofar as it attempts to authorize the leasing, during the infancy or unsoundness of mind of the owner, the 'coal, oil, gas and other minerals or mineral substances, and products' for a period beyond the minority of the infant, or beyond the period when the disability of the person of unsound mind is removed, is void.

"*Wherefore,* the judgment is reversed, with directions to proceed in conformity with this opinion."

It is true that, upon rehearing, this opinion was modified so as not to include oil and gas leases, but this was up-

on the sole ground that the lease before the court was a coal lease. The court said (205 S. W. 951):

> "In a petition filed by counsel for the Oil Men's Association of Kentucky, we are asked to so modify the opinion as to exempt from its effect oil and gas leases, and this upon the ground that the case we had only involved a lease of coal lands and there is such a substantial defense in the nature and quality of coal and other minerals, and oil and gas, as to warrant a different method of determining the validity of a lease of the one class from the other.
>
> "In view of the importance of the question presented and the fact that the oil and gas interests of the state were not represented on the hearing of the case, we have decided to withdraw so much of the opinion as holds that the act is invalid insofar as it authorized the leasing for an unlimited term of the oil and gas rights, and privileges of infants and persons of unsound mind in order that this special feature of the act may be considered and determined in a case in which there is directly involved the question of the right to lease for an unlimited term the oil and gas rights and privileges of infants and persons under disability. In all other respects the opinion is adhered to, and the several petitions filed for a rehearing are overruled."

Leases of all other kinds of minerals are held to be unconstitutional if made beyond the minority of the ward, and the only reason for not so holding as to an oil and gas lease was that the lease before the court was a coal lease and the oil and gas interests were not represented on the hearing of the case. That the reasoning of the court must logically apply to any kind of lease beyond the minority of the ward is so obvious as to need no argument.

That there is no distinction between a coal lease and an oil and gas lease was held in the case of *Appeal of Stoughton, supra,* where the court said:

"Oil is a mineral, and being a mineral, is part of the realty. *Funk* v. *Holdeman*, 5 Pe. St. 229. In this it is like coal, or any other mineral product which, *in situ*, forms part of the land. * * * Whenever conveyance is made of it, whether the conveyance be called a 'lease' or a 'deed' it is, in effect, the grant of part of the corpus of the estate, and not of the mere incorporeal right. In the case above cited this is said to be so as to leases of coal land for purposes of mining, *and there is no reason why the same doctrine should not apply to oil leases.*" (Italics ours.)

Let us now consider the reasoning of the *Tierney Coal Company* case, *supra*, in connection with what is said by the Supreme Court of the United States in *Chicago, etc., R. R. Co.* v. *Chicago; Buchanan* v. *Warley*, and *Scott* v. *McNeal*, *supra*, the respective quotations from which follow:

"The 14th Amendment protects life, liberty and property from invasion by the states without due process of law. * * * Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land."

"In determining what is due process of law regard must be had to substance, not to form."

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

"They (probate courts) have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind."

There can be no doubt but that, if we pay regard "to substance, not to form," the purported leases in this case deprive Leonard D. Ingram of his property without due process of law. Indeed, the questions raised by the Supreme Court in the case of *Haddock* v. *Bronaugh*, *supra*, become very pertinent here:

"Would such leasing beyond the period open the door to fraud? The power once granted, may not a guardian by approval of the court deprive a ward of the control of his property for such long period after he reaches his majority, as to amount to a partial deprivation of the owner's right to acquire and enjoy his own?"

Issue V.

The Oklahoma law, which authorizes the appointment of a guardian for the person and property of an individual who is alleged to be a minor, without any notice or opportunity to be heard having been given to him, is unconstitutional in that it deprives such individual of his liberty and property without due process of law.

Point 1.

The laws of Oklahoma do not require notice to the alleged minor.

Section 1431, Compiled Oklahoma Statutes, 1921, is the section which authorizes such appointment, and is as follows:

"The County Court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either, or both of them, of minors who have no guardian legally appointed by will, or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person in behalf of such minor. Before making the appointment the judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor."

This statute has been construed by the Supreme Court of Oklahoma to mean that no one is entitled as of right to any particular notice, but that the only jurisdictional notice required is that which the county judge, in his absolute discretion deems reasonable. In the case of *Crabtree* v. *Bath, et al.*, 102 Okl. 1, 225 Pac. 924, that court held:

> "As to the first one, the plaintiff says that the posted notice was insufficient to confer jurisdiction on the court to enter the judgment appointing Hunter as guardian. This draws in question section 1431, Compiled Statutes of Oklahoma, 1921, which provides in part:
>
> > 'Before making the appointment the judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor.'
>
> "We think that this contention is not a new question, but is disposed of in the case of *Asher* v. *Yorba*, 125 Cal. 513, 58 Pac. 137, where, under the same kind of statute, the court said: 'The kind or character of the notice to be given is a matter for the judge to determine.' And where personal notice is not absolutely required, a notice by posting is sufficient."

Not even such notice as the judge deems reasonable is required by the statute to be given to the alleged minor.

Point 2.

The finding by the court that the disability of minority exists, is conclusive upon collateral attack.

In *Lowery, et al.*, v. *Parton*, 65 Okl. 232, 165 Pac. 164, the Supreme Court of Oklahoma held in the second syllabus (the syllabus being the law of the case under section 803, Comp. Okla. Stat., 1921):

"Where an order of the probate court in appointing a guardian recites in the order of appointment that the party for whom the application for appointment of guardian was made was a minor 20 years of age, same is conclusive on collateral attack."

There are numerous Oklahoma cases holding that the jurisdictional facts necessary to the appointment of a guardian cannot be inquired into collaterally. The following are a few of such cases:

Johnson v. *Johnson*, 60 Okl. 206, 159 Pac. 1121;

Johnson v. *Furchtbar*, 96 Okl. 114, 220 Pac. 612;

Bank of Ingersoll v. *Dresia*, 103 Okl. 166, 229 Pac. 567.

Point 3.

That a person, even though he is in fact a minor, has personal and property rights which are taken away by the appointment of a guardian, is clear.

Sections 4976 and 4977, Compiled Oklahoma Statutes, 1921, provide:

4976—"A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control, except as otherwise specially provided."

4977—"A minor may make any other contract than as above specified in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this chapter."

In construing the powers of infants the Supreme Court of Oklahoma holds:

"In this state, with certain statutory exceptions, an infant has the power to contract in the same man-

ner as an adult, subject to his personal privilege of disaffirmance."

—*Webb* v. *Harris*, 32 Okl. 491, 121 Pac. 1082 (2nd syllabus).

The following Oklahoma authorities show the effect of the appointment of a guardian:

"A guardian appointed by a court has power over the person and property of the ward, unless otherwise ordered.

"A guardian of the person is charged with the custody of the ward, and must look to his support, health and education. He may fix the residence of the ward at any place within the state, but not elsewhere, without the permission of the court."

—Sections 6586, 6587, Comp. Okl. Stat., 1921.

"A general guardian of the estate of a minor is entitled to the exclusive possession, together with the care and management of the estate of such minor committed to his trust * * *."

—*In re Bolin's Estate, et al.*, 22 Okl. 857, 98 Pac. 934.

Point 4.

Notice and opportunity to be heard are essential elements of due process of law in judicial proceedings, and the absence of these essential elements makes a judgment absolutely void.

This is a well settled principle of constitutional law and is enunciated in the following cases:

Harris v. *Hardeman*, 14 How, 334, 14 L. ed. 444;
Mason v. *Eldred*, 73 U. S. 231, 18 L. ed. 783;
Windsor v. *McVeigh*, 93 U. S. 274, 23 L. ed. 914;
Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565;
Smith v. *Woolfolk*, 115 U. S. 143, 29 L. ed. 357;

Wilson v. *Seligman*, 144 U. S. 41, 36 L. ed. 338;
Mexican Central Ry. Co. v. *Pinkney*, 149 U. S. 194, 37 L. ed. 699;
Clark v. *Wells*, 203 U. S. 164, 51 L. ed. 138;
New York Life Insurance Co. v. *Dunlevy*, 241 U. S. 518, 60 L. ed. 1140;
Postal Telegraph-Cable Co. v. *City of Newport*, 247 U. S. 464, 62 L. ed. 1215.

Infants are entitled to notice before a valid personal judgment can be rendered against them.

A judgment appointing a guardian for the person and estate of an alleged minor is one which finds that such alleged minor is under a personal disability to manage his person and property, and which places such management under the care and control of a guardian. Such appointment is not a proceeding *in rem* against any particular property, but is primarily a determination that a citizen is under a personal legal disability, and therefore that he is not entitled to exercise the privileges, powers, and other legal relations involved in fundamental conceptions of liberty and property. A clear definition of an action *in personam* is contained in the following quotation from *Pennoyer* v. *Neff*, *supra:*

> "But where the entire object of the action is to determine the *personal rights and obligations of the defendants, that is, where the suit is merely in personam,* constructive service in this form upon a nonresident is ineffectual for any purpose." (Italics ours.)

In the case of *New York Life Insurance Co.* v. *Bangs*, 103 U. S. 441, 26 L. ed. 580, the question before this court was the validity upon collateral attack of a judgment cancelling an insurance policy as against an infant, there hav-

ing been no personal service of process upon the infant, but process having been served upon the general guardian of the infant and a guardian *ad litem* having been appointed, who represented the infant in the case. It was held that the judgment was void. Mr. Justice FIELD, speaking for the court said:

> "But in none of the cases to which our attention has been called has a judgment been upheld where a guardian *ad litem* had been appointed for a nonresident infant against whom a purely personal demand was prosecuted. If such a case exists, the judgment in it can have no greater force than one rendered for a personal demand against a non-resident upon *any other form of constructive service.* And, that constructive service will not give jurisdiction in such cases, is the established doctrine of this court. *Pennoyer* v. *Neff*, 95 U. S. 714." (Italics ours.)

Even residents are entitled to personal notice before a valid personal judgment can be rendered against them.

In *Webster* v. *Reid*, 11 How. 437, 13 L. ed. 761, this court held:

> "These suits were not a proceeding *in rem* against the land, but were *in personam*, against the owners of it. *Whether they all resided, within the territory or not does not appear, nor is it a matter of any importance.* No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold." (Italics ours.)

For same holding see *Bickerdike* v. *Allen*, 41 N. E. 740, 157 Ill. 95.

A guardian cannot be appointed for an alleged insane or incompetent person without personal notice.

In the case of *Simon* v. *Craft,* 182 U. S. 437, 45 L. ed. 1165, a guardian was appointed for one Mrs. Simon by the probate court of Mobile County, Alabama, upon the ground that she was of unsound mind. Mrs. Simon was forty-nine years old, a resident of Alabama, was personally served with notice of the hearing and given an opportunity to be heard. This was an action to recover real estate sold by the guardian. It was held that the appointment of the guardian was conclusive on collateral attack. While notice and opportunity to be heard were given in this case, it is clear from the reasoning of the court that, had there been no notice and opportunity to be heard, Mrs. Simon's property would have been taken without due process of law. In the course of his opinion Mr. Justice WHITE, speaking for the court said:

> "It is not seriously questioned that the Alabama Statute provided that notice should be given to one proceeded against as being of unsound mind, of the contemplated trial of question of his or her sanity. * * *"
>
> "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things, and not by mere form. *Louisville & N. R. Co.* v. *Schmidt,* 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 230. We cannot, then, *even on the assumption that Mrs. Simon was of sound mind,* and fit to attend the hearing, hold that she was denied due process of law by being refused an opportunity to defend, *when, in fact, actual notice was served upon her of the proceedings, and when, as we construe the statute, if she had chosen to do so, she was at liberty to make such defense as she deemed advisable.*
>
> * * * * * * *

"If *the essential requisites of full notice and an opportunity to defend* were present, this court will accept the interpretation given by the state court as to the regularity, under the state statute, of the practice pursued in the particular case." (Italics ours.)

It is clear, on principle, that the decision of this court would have been the same if the state court had found that Mrs. Simon (who was in fact forty-nine years old) was a minor and had appointed a guardian upon the ground of disability due to minority; the particular type of legal disability found by the state court to exist would not affect its power to appoint a guardian. In other words, it is submitted that the jurisdiction of the state court, under the due process clause of the 14th Amendment, existed by virtue of the giving of notice and opportunity to defend to the person alleged to be under disability, and not by the fact of disability.

In *Chaloner* v. *Sherman*, 242 U. S. 455, 61 L. ed. 427, a case very similar on its facts to *Simon* v. *Craft*, *supra*, it was held that, because the plaintiff (who was found to be insane by the Supreme Court of New York) had notice and an opportunity to be heard, the order appointing defendants as committee of plaintiff's estate was "a complete defense" to plaintiff's action of trover, Mr. Justice BRANDEIS, speaking for the court, said in the course of his opinion:

"*As the plaintiff had notice and opportunity to be heard* at each stage of these proceedings, the essential elements of due process of law were fully met, and the court had jurisdiction to enter that order."

* * * * * * *

"That court had jurisdiction *because the plaintiff*

and his property were in New York and the essentials of due process were met." (Italics ours.)

The record is silent as to whether Leonard D. Ingram was in fact a minor. It is but to argue in a circle to say that Leonard D. Ingram was a minor and therefore that the court had jurisdiction to appoint a guardian for his person and property. If the court had jurisdiction to make the appointment, it is immaterial whether he was a minor or not. *Simon* v. *Craft, supra; Chaloner* v. *Sherman, supra.* On the other hand, if the court did not have jurisdiction, the actual facts in the case are immaterial. *Rees* v. *City of Watertown,* 86 U. S. 107, 22 L. ed. 72; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 59 L. ed. 1027. In the case of *Pennoyer* v. *Neff, supra,* it was argued that, since the nonresident defendant had property within the state, it was immaterial whether it was first attached and applied to the satisfaction of the judgment, or the judgment first rendered and then the property seized and sold to satisfy the judgment. But it was held that the seizure of the property was an essential element to the acquisition by the court of the power, which is the basis of jurisdiction, to act at all. In other words, jurisdiction is acquired, not by the mere existence of certain facts, but through the bringing of the defendant or his property under the physical control of the court by the doing of certain acts by the officers of the court or by the defendant himself. These acts consist of *(1)* in actions *in personam,* personal service of notice upon the defendant, or his voluntary appearance; *(2)* in actions *in rem,* seizure of the defendant's property and constructive service of notice upon the defendant. In this connection the court said in *Pennoyer* v. *Neff, supra:*

"It (the judgment) cannot occupy the doubtful position of being valid if property be found, and void if there be none."

Likewise in this case the validity of the judgment appointing a guardian for the person and property of Leonard D. Ingram cannot be made to depend upon whether he was in fact a minor, but upon whether the court acquired jurisdiction to determine that fact by giving notice and opportunity to defend.

Even in actions *in rem* some notice must be given before a valid judgment can be rendered.

In the case of *Windsor* v. *McVeigh, supra,* it was held by this court as follows:

"The position of the defendant's counsel is, that, as the proceeding for the confiscation of the property was one *in rem,* the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture and, consequently, had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and

informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed, before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. *The manner of the notification is immaterial, but the notification itself is indispensable.*" (Italics ours.)

In the slightly different case of a decedent's estate this court holds as follows with reference to determining the fact of the decedent's domicil:

"How is the fact of decedent's domicil to be judicially ascertained as a step in determining what law is to govern the distribution? Obviously, if fundamental principles of justice are to be observed, the ascertainment must be according to due process of law; that is, either by a proceeding *in rem* in a court having control of the estate, or by a proceeding *in personam* after service of process upon the parties to be affected by the judgment."

—*Baker* v. *Baker, Eccles. & Co.*, 242 U. S. 394, 61 L. ed. 386.

Point 5.

In order to constitute due process of law the notice and opportunity to be heard must be required by the state law.

Extra official or casual notice, or notice granted as a matter of favor or discretion is not sufficient. Notice and opportunity to be heard must be required by the state law. In the case of *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 59 L. ed. 1027, it was said by this court:

> "Nor can extra official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the constitution requires. In *Stuart* v. *Palmer,* 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expenses of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in *Security Trust & S. B. Co.* v. *Lexington,* 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice PECKHAM, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace, or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the tax payer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute.' (Citing the New York case). So in *Central of Georgia R. Co.* v. *Wright,* 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said; 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.'

In *Roller* v. *Holly*, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in *Louisville & N. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such'."

Point 6.

It is immaterial that the person against whom a judgment is sought would have had no defense if he had been given notice and an opportunity to be heard.

If it be said that Leonard D. Ingram would have had no defense had notice and opportunity to be heard been given him, or, if it be argued that Leonard D. Ingram was a minor (although this fact does not appear in the record), and therefore, that he would not have been benefited by notice, such arguments are immaterial under the decisions of this court. In *Coe* v. *Armour Fertilizer Works, supra*, this court says:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

In the case of *Rees* v. *The City of Watertown*, 86 U. S. 107, 22 L. ed. 72, 77, this court said:

> "Whether, in fact, the individual has a defense to the debt, or by way of exemption, or is without defense, is not important. To assume that he had none, and therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest."

Not only does the law of Oklahoma assume that a person alleged to be a minor is in fact a minor, and that he has no other argument against the appointment of a guardian for his person and estate, but such assumption is held by the Supreme Court of Oklahoma to be conclusive on collateral attack. The result is that the County Courts of Oklahoma are held (it is submitted by circular argument) to have jurisdiction to appoint a guardian for an alleged minor without any notice to him, and that, since the court had jurisdiction, its finding of the jurisdictional fact is conclusive on collateral attack. *Lowery, et al.*, v. *Parton, supra.*

Issue VI.

As to the southeast quarter of the southwest quarter of section two (2), township nineteen (19) north, range seven (7) east, the purported leases in this case are void for the reason that they are in contravention of a valid provision of the original homestead patent to Leonard D. Ingram.

This provision is as follows:

> "Subject however to the conditions prescribed by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrances whatever for twenty-one years."

We are aware of the Act of Congress which attempts to destroy this provision in the homestead deed of said Leonard D. Ingram (Act of May 27, 1908—35 Stat. at L. 312 Chap. 199).

The validity of this act so far as the non-taxable provision is concerned was before the Supreme Court of the United States in the cases of:

Choate, et al., v. *Trapp*, 224 U. S. 665, 56 L. ed. 941;

English v. *Richardson*, 224 U. S. 680, 56 L. ed. 949.

In holding the act invalid in this connection because it deprived the allottee of his property without due process of law, contrary to the 5th Amendment to the Constitution of the United States, the Supreme Court said in *Choate* v. *Trapp, supra* (parentheses ours):

> "The individual Indian had no title or enforceable right in the tribal property. But as one of those entitled to occupy the land, he did have an equitable interest, which Congress recognized, and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of non-taxable land (and alienable land, too) only to those who would relinquish their claim in the other property of the tribe formerly held for their common use. * * *
>
> "There was here, then, an offer of non-taxable land (and inalienable land, too). Acceptance by the party to whom the offer was made, with consequent relinquishment of all claim to other lands, furnished a part of the consideration, if, indeed, any was needed, in such a case, to support either the grant or the exemption (or, indeed, the restriction). * * * Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms although it was not actually signed by him."
>
> "As the plaintiffs were offered the allotments on the conditions proposed (one of the conditions was that the land be restricted for 21 years); as they accepted the terms, and, in the relinquishment of their claim,

furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were. * * *

"The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. (Why not to the restriction?) Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him ten acres, or fifty acres, or the timber growing on the land. After he accepted the patent the Indian could not be heard, either at law or in equity to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued. (Why not by all of the terms of the patent?) * * *

"But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. * * *

"The provision that 'all land shall be non-taxable' naturally indicates that the exemption is attached to the land (why not the restriction?), only an artificial rule can make it a personal privilege. But if there is any conflict between the natural meaning and the technical construction—if there were room for doubt, or if there were any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that doubt, under this rule, must be resolved in favor of the patentee."

(This last paragraph is particularly applicable to answer a dictum of the court which says:)

> "But the exemption and non-alienability were two separate and distinct subjects. *One conferred a right and the other imposed a limitation.*" (Italics ours.)

(If the patentee regarded the disability and immunity granted by the restriction of sufficient importance to have it inserted in the patent which he accepted in return for his relinquishment of his equitable interest in all the other tribal property, why should not the doubt as to whether this is a limitation and repealable, or "an incident attached to the land itself for a limited period," "be resolved in favor of the patentee," also?)

In *English* v. *Richardson, supra,* a Creek homestead patent, identical in form with the one herein involved, was before the Supreme Court of the United States upon the same question as that raised in the case of *Choate* v. *Trapp.* the court held:

> "The right of plaintiff to the exemption granted by Congress is protected by the constitution on principles stated and applied in *Choate* v. *Trapp.*"

No case has yet been decided by the Supreme Court of the United States in which the question of whether the restriction contained in the homestead patent was protected by the Fifth Amendment. Any suggestion in *Choate* v. *Trapp,* that it is not is the merest dictum and not authority upon the proposition. For, as said in the case of

> *Pollock* v. *Farmers' Loan and Trust Co.,* 157 U. S. 429, 39 L. ed. 759, 817:

> "Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue."

The case of *Williams* v. *Johnson*, 239 U. S. 414, 60 L. ed. 358, may be cited by appellee as controlling. This case is not controlling for two reasons: *(1)* The allottee was not raising the question of the validity of the removal of the restrictions. *(2)* The restriction was not inserted in the patent as was true in the instant case.

Conclusion.

We submit that the decree of the District Court brought here for review is a most unjust one. It in effect holds that a man's property may be taken without consulting him, or without giving him a chance to protest or make any defense of his property and his rights.

The record shows that the hearing at which the guardian was appointed took place January 3rd, 1911, and that Leonard D. Ingram received no notice of a hearing to be had on that day, or of any hearing that was actually had. The record shows that the only notice that was given was a notice of a hearing to be had January 3rd, *1910*.

The record does not show that Leonard D. Ingram was, in fact, a minor, nor does the record show that Leonard D. Ingram was present at the hearing. If under such procedure as this the court can take a man's property and appoint a guardian to control it, no man's property is safe. The State of Oklahoma has been guilty of many serious offenses against the Indians and Freedmen, who received allotments from the Government, but there is not a single case that shows a more glaring overriding of the rights of an individual in his liberty and property, which are supposed to be protected by the state and its agencies, than in this case. Why, there is not even a pretense that the individual has had his day in court! Nor are there any equita-

ble circumstances which would warrant an overlooking of the notice. No guardian *ad litem* was appointed, not even such constructive notice as a court of equity could count as equivalent to a notice was given. In this case there was absolutely no notice or opportunity to be present and defend one's rights.

It can hardly seriously be contended that local rules of property can preclude this court from stepping in and protecting the constitutional rights of Leonard D. Ingram. It is academic that constitutional questions are not governed by local law. As to the questions that might ordinarily be local law, they could not be local law in this case because the first Oklahoma decision touching upon the questions here involved, was decided after the contract herein was made. The first decision touching upon this matter was decided in May, 1912 *(Duff* v. *Keaton, supra)*. This contract was made in 1911. Therefore the Supreme Court cannot be bound by any question of local law *(Kuhn* v. *Fairmont Coal Co., supra)*.

The appellee, The Prairie Oil and Gas Company, must have had serious doubts about the validity of its lease for the record shows that it had three separate leases executed to it in one year. But the record also shows that each of the separate leases was executed on the same day and without any notice of any kind having been given to Leonard D. Ingram. The corporation seemed to have labored under the impression that it could correct an error by multiplying it. But there is an old adage which says "Two wrongs cannot make a right." It is pertinent to inquire just why the corporation had three separate oil leases made upon the same property by the same guardian of this property in the same year.

But even if these serious defects were not in the record to make the lease void, the lease would be void for the reason that in the sale of it, the guardian and the County Court did not follow the procedure prescribed by the legislature for the sale of a ward's property. The statutes of Oklahoma prescribe that for the sale of real property or the sale of personal property notice must be given. It is true that the Supreme Court of Oklahoma has attempted to hold in regard to leases, that leases are not real property or personal property. It is significant that this ruling of the Supreme Court has only been made where it has been asked to set aside leases held by large corporations which have developed the oil industry in the State of Oklahoma. In all other cases where the Supreme Court has passed upon the nature of oil and gas leases it has held that they are realty and are governed by the laws of realty. Even if the court had not so held one would wonder what species of property there can be that is neither personal property nor real property and is governed neither by the rules that govern personal property nor real property. The Oklahoma Supreme Court has held in a whole string of cases that the sale of an oil and gas lease is a sale of an interest in real estate and that the rules that govern real estate govern the sale of oil and gas leases and the interest conveyed by leases for oil and gas. The same thing is held almost uniformly throughout the United States. We submit that the matters involved here should not be confused with a question of whether or not a lessee is entitled to specific performance or is entitled to bring an action of ejectment. Here the only question is whether or not there is sufficient property interest and property value in an oil and gas lease to make it necessary for a guardian in sell-

ing a ward's oil and gas lease to conform to the rule prescribed by the Legislature of Oklahoma for the sale of the property of a ward. For the question here involved it does not matter whether the lease is personalty or realty. If it is property, the guardian should conform to the procedure prescribed for the sale of personal property or to the procedure prescribed for the sale of real property. In the sale of these leases, the guardian conformed to neither; therefore the leases are absolutely void. We are not here concerned with the question as to whether or not there is sufficient vested interest in the lessee after the sale of an oil and gas lease to entitle him to bring an action of ejectment or to entitle him to specific performance. We are concerned with the question as to whether or not the property involved in the sale of an oil and gas lease is sufficiently important and sufficiently substantial and real to warrant the court holding that the legislature intended that the guardian should follow the rule prescribed for the sale of property belonging to a ward.

It has sometimes been contended that the legislators did not intend that a lease should be governed by the rules prescribed for the sale of property belonging to a ward. In this connection it is argued that a lease is not specifically named in the statute prescribing the sale of personal property or real property and that therefore it is not included under either division; and that since it is not specifically included, by name, under either division it is not covered by the statute prescribing the sale of property belonging to a ward. This is a specious argument evolved for the convenience of those who want to keep the vested interest obtained by corporations in the land of ignorant Indians and Freedmen in the State of Oklahoma. The whole necessar-

ily contains the part. Real estate embraces every interest in land and must contain every interest that is properly governed by the rules of real estate and is considered part of real estate. An oil and gas lease is certainly governed by the rules of real estate and considered a part of real estate and must have been included under real estate when the legislators made the provision for the sale of real estate. If it were not so serious, one would be amused at the twists and turns that the Oklahoma Supreme Court has made to refrain from holding void some of the leases obtained by rich oil companies. In the case of *Duff* v. *Keaton, supra,* decided in 1912, the court held that an oil and gas lease was an 'incorporeal hereditament' and a 'chattel real' and was personalty and therefore was not governed by the rules prescribed for the sale of real property. In the case of *Papoose Oil Co.* v. *Swindler, et al., supra,* the court held that an oil and gas lease was neither realty nor personalty. In the latter case, the court was squarely called upon to set a lease aside for the reason that the guardian had not complied with the rule for the sale of real property nor with the rule for the sale of personal property. In order to avoid setting the said lease aside the court held that it was not real property and not personal property. In the case of *Bentley* v. *Zelma Oil Company, supra,* the same court held that a contract for the sale of a one-half interest in a lease was void for the reason that it was not under seal as required by the statutes of Oklahoma; and that all instruments affecting real property should be under seal if executed by corporations. Another interesting fallacy that the Oklahoma Court had been actuated by is the fallacy that, because of the roving nature of oil and gas it is identical with wild animals. The court mistakes a sim-

ilarity for identity: oil and gas does not partake of the nature of real property because it has one characteristic of a certain class of personal property. In the case of *Rich* v. *Doneghey, supra,* the Supreme Court after discussing the roving nature of oil and gas said that though an oil and gas lease is denominated a lease, strictly speaking it is not such, but it is in effect a grant *in praesenti* of all rights to the oil and gas to be found in the lands, and to the right for the term of the lease to enter and search therefor, and if found to produce and remove them, not only during said term, but also as long thereafter as oil is produced; and to occupy so much of the surface of the land as may be necessary for the purpose of exploration or production, or both. In the case of *Lynch* v. *Alworth Company, supra,* this court recently made this significant statement speaking of a lease, "And there can be no doubt that such an instrument is property." The Supreme Court of Oklahoma has held that a lease is a license as distinguished from personal property or real property. It is true that oil and gas leases are sometimes referred to as licenses. But, as Tiffany points out, the word license is used merely to distinguish between cases where the mineral is sold in place and where the right to take the mineral or to search for the mineral and take it after it is found is used. The latter case usually is described as a license, but it is in fact a *profit a'prendre* and an interest in real estate and not a mere license. Nowhere in American jurisprudence is there such a distinction made of a lease as is made by the Oklahoma Supreme Court. And yet it is argued that the legislators, when they prescribed for the sale of personal property and real property, had in mind this distinction and deliberately failed to prescribe for the procedure to be followed in the sale

of an oil and gas lease, which is in most cases, or in many cases, the most important part of a ward's property. It is more logical to presume that, since the legislators did not name an oil and gas lease, they understood that an oil and gas lease was governed by the rules of real property and that they were provided for when they provided for real property. It will be conceded that the legislators intended to prescribe for all of the property belonging to a ward. In Anglo-American law real property and personal property collectively embrace all property known. This would seem to be a further argument that the legislators thought that they were taking care of oil and gas leases when they provided for the sale of real property. In this connection, it is well to remember that the power of the County Court and the guardians of the County Court is limited by the Statutes and Constitution, and that they have no power or authority except what is expressly given to them by the Statutes and Constitution.

Even under the laws of Oklahoma the guardian has no power to execute an oil and gas lease beyond the minority of a ward. All of the Oklahoma cases hold that the County Court is a court of limited jurisdiction and has no power and authority except such as are granted to it specifically by the Statutes and Constitution. In the case of *Haddock* v. *Bronaugh*, *supra*, the Oklahoma Supreme Court held in a well considered opinion that the County Court had no authority to make an agricultural lease beyond the minority of a ward. So far as power to execute a lease beyond minority is concerned, the same statute which gives authority to make agricultural leases of a ward, gives authority to make mining leases. Not only is that so, but on principle there is no distinction between the making of an ag-

ricultural lease and a mining lease beyond minority, and the principles decided in the *Haddock* case are applicable to an oil and gas lease, and the County Court has no power to make an oil and gas lease beyond the minority of the ward any more than it has an agricultural lease. It is true that in the case the court attempted, by way of dictum, to suggest that there is a difference between an oil and gas lease and an agricultural lease. But, as to the power of the guardian to execute same, there could be no distinction at all.

But even if the law of Oklahoma gave the County Court, through its guardian, power to make a lease beyond the minority of a ward, such a law would be unconstitutional. The only excuse for appointing a guardian is to protect and preserve the property of an individual who is incapacitated by insanity or minority or some other disability. The policy of the law is to exercise control over an individual's property only as long as it is necessary. It certainly cannot be argued that, having had power to appoint a guardian for a period of disability, that will give the County Court and guardian power to take a man's property after the period of disability has passed off. The case of *Tiernay Coal Co.* v. *Smith's Guardian, supra,* is a complete answer to any arguments to this effect.

The purported leases covering the southeast quarter of the southwest quarter of section two, township nineteen north, range seven east, are void for the reason that they were made on the homestead granted to Leonard D. Ingram by a patent which provided that the said land should be non-taxable and inalienable and free from any incumbrances whatever for twenty-one years. The patent was issued July

1, 1907. The acts attempting to destroy non-taxability have been uniformly held unconstitutional by this court. There have been *some dicta* handed down by this court which seem to make a distinction between the inalienability clause and the non-taxability clause on the ground that the non-taxability clause was a benefit and the inalienability clause was a limitation. But for the purposes and consideration of the helpless people to whom these patents were issued, the inalienability clause was as much a benefit as the non-taxability clause. The only reason for putting this provision in the patent at all was to protect the helpless, ignorant, inexperienced individuals from the grafters whom the leaders of the tribes foresaw would swoop down upon them as soon as the land was divided and they had it in their individual names. Certainly, if it was understood that this was a benefit to the Indians and freedmen belonging to the various tribes, Congress has no power to pass an act lifting the so-called inalienability clause. Therefore, the attempt of Congress to destroy the inalienability clause was null and void and of no effect. For that reason the homestead land, above referred to, belonging to Leonard D. Ingram, was inalienable, and the guardian had no power to sell or lease the said land.

Finally, we submit to this court that we have here a clear case of a rough-handed overriding of the rights of an unprotected and helpless freedman. No notice of the appointment of the guardian was given; the property was sold without any notice, without any formality, and without any attempt to comply with even the Oklahoma statutes for the sale of personal property or real property belonging to a ward. Not only so, but in this case there is a clear attempt to take the property of an individual after the so-called

period of disability of minority has come to an end. Such an attempt is nothing but an attempt to take the property belonging to an adult individual.

It is fundamental in Anglo-American law that every sane adult individual has the inalienable and absolute right to the control of his property. And any attempt to take or defeat that right by extending the power of a guardian beyond minority by intendment, is directly opposed to the provisions of the Constitution and fundamental laws of American jurisprudence. The only semblance of a contention that the corporation has is that for the sake of expediency it is necessary to extend the lease beyond the minority of a ward. When did this court permit expediency to override the fundamental principles of our Constitution? Where fundamental principles of the Constitution are involved, this court is not concerned with individual cases, but it is interested in laying down fundamental principles that will be for the best good of the whole of the people, and it is certainly clear that it is for the best good of the whole people to protect the constitutional rights of sane, adult citizens to the uninterrupted and undefeated and unlimited enjoyment of their property.

We submit, therefore, that the decree of the honorable District Court should be reversed and here entered in favor of the appellants and against The Prairie Oil & Gas Company.

Respectfully submitted,

CARTER WALKER WESLEY,
Solicitor for Appellants.

J. ALSTON ATKINS,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 458.

MINERVA JONES, PHILLIP A. LEWIS, AND CARTER W. WESLEY, TRUSTEES, ETC., *ET AL., Appellants,*

vs.

THE PRAIRIE OIL AND GAS COMPANY, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

SUPPLEMENTAL BRIEF OF APPELLANTS.

Jurisdiction.

At the time the original brief was prepared and filed in the above styled case, the appellants did not have a copy of the recent Supreme Court rules which became effective July 1st, 1925. Since receiving these rules, the appellants have discovered that they had not set out, with the particularity and preciseness required by paragraph "C" of Rule 25, styled "Briefs," the jurisdiction of this court. This supplemental brief is submitted to correct that defect in the original brief.

1. The judgment complained of herein and appealed from was rendered on the 27th day of April, 1925, in the United States District Court for the Northern District of Oklahoma (R. 17).

2. Appellants claimed in the lower court that the attempted appointment of a guardian for the person and the property of the appellant, Leonard D. Ingram, without the service of any notice of any kind upon the said Leonard D. Ingram or any one else, was void as being a violation of the Fourteenth Article of Amendment to the Constitution of the United States in that the same deprived the said Leonard D. Ingram of his liberty and his property without due process of law (R. 3).

That it was a violation of the Fourteenth Article of Amendment to the Constitution of the United States to permit the purported guardian, appointed without any notice, to execute an oil and gas lease on the land of Leonard D. Ingram for a period "during the minority of said Leonard D. Ingram and as much longer thereafter as oil or gas is produced in paying quantities," and that the said execution of a lease on the land of said Leonard D. Ingram was a taking of property without due process of law (R. 4-5).

That the State of Oklahoma, under the Constitution of the United States and the State of Oklahoma, through its agency, the County Court of Wagoner County, Oklahoma, had no power to deprive the appellant, Leonard D. Ingram, of his property by appointing a guardian of the person and property of the said Leonard D. Ingram without any notice, and authorizing such guardian to execute a lease on the said land of Leonard D. Ingram as aforesaid (R. 5).

That the Act of Congress of May 27th, 1908 (32 Statutes at Large 503), which attempted to destroy and remove the restrictions against alienation, contained in the homestead deed from the Muskogee (Creek) Nation to the appellant, Leonard D. Ingram, as a member of said Nation, deprives the said Leonard D. Ingram of his property without due process of law, contrary to the Fifth Article of Amendment to the Constitution of the United States (R. 6-7).

The respondent in answer to these claims filed a motion to dismiss on the ground that the second amended bill of complaint failed to state a cause of action. The lower court sustained the motion and dismissed the second amended bill of complaint on the ground that it did not state a cause of action and allowed the appellants exceptions (R. 17-18).

The jurisdiction of this court is invoked under section 238 of the judicial code which provides that appeals may be taken direct to the Supreme Court in any case that involves the construction or application of the Constitution of the United States; or the constitutionality of any law of the United States; and in any case in which the constitution or laws of a state is claimed to be in contravention of the Constitution of the United States.

The jurisdiction of this court in this case is sustained by the following cases:

Kuhn v. *Fairmont Coal Company*, 215 U. S. 349, 54 L. ed. 228.

Scott v. *McNeal*, 154 U. S. 34, 38 L. ed. 896.

(The principles relied upon in the two above cases are fully set out at pages 23-24 and 25 of the original brief filed herein.)

Wilson v. *The Public Iron & Steel Co.*, 257 U. S. 92, 66 L. ed. 144; and

Lipke v. *Lederer*, 259 U. S. 556, 66 L. ed. 1061.

The last two cases hold respectively that a decree dismissing a bill of complaint is a final judgment for the purposes of a review; and that the federal Supreme Court has jurisdiction of a direct appeal from a decree of a District Court dismissing a bill in a suit where complainants contend that state statutes or laws are in conflict with the guarantees of the federal constitution respecting due process of law.

Respectfully submitted,

CARTER WALKER WESLEY,
Solicitor for Appellants.

J. ALSTON ATKINS,
Of Counsel.

No. 109

In the Supreme Court of the United States.

October Term, 1925.

MINERVA JONES, PHILLIP A. LEWIS, AND CARTER W. WESLEY, TRUSTEES, ETC., *ET AL., Appellants,*

VERSUS

THE PRAIRIE OIL AND GAS COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

BRIEF ON BEHALF OF APPELLEE.

T. J. FLANNELLY,
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Both of Independence, Kansas,
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AUTHORITIES.

N THE SUPREME COURT OF THE UNITED STATES.

October Term, 1925.

No. 458

MINERVA JONES, PHILLIP A. LEWIS, AND CARTER W. WESLEY, TRUSTEES, ETC., *ET AL., Appellants,*

vs.

THE PRAIRIE OIL AND GAS COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

BRIEF *on* BEHALF *of* APPELLEE.

Statement of the Case.

In this action appellants seek to cancel certain oil and gas leases executed by the guardian of Leonard D. Ingram covering certain lands situate in Creek County, Oklahoma. The leases are attacked first upon the grounds that Minerva Ingram was not the lawfully appointed guardian of Leonard D. Ingram, it being alleged in the second amended bill as grounds for the invalidity of the appointment of Minerva Ingram as follows:

"*2.* That, on said 3rd day of January, 1911, said relator, Leonard D. Ingram, was a citizen of the United States and entitled to the benefit and protection of said provision of the Constitution of the United States, and that under and by virtue of said provision said relator, Leonard D. Ingram, was entitled to personal service of notice upon him of the hearing for said purported appointment of a guardian of his person and estate, and was entitled to an opportunity to be heard in defense of his liberty and property before the County Court of Wagoner County, State of Oklahoma, could make a valid appointment of a guardian of the person and estate of said relator, Leonard D. Ingram.

"*3.* That no notice of any kind whatsoever was given to said relator, Leonard D. Ingram, either by personal service of notice upon him, or otherwise, of the hearing upon which the County Court of Wagoner County, State of Oklahoma, attempted to appoint a guardian of the person, property and estate of said relator, Leonard D. Ingram, and that said purported and attempted appointment was and is in violation of the above quoted provision of the Fourteenth Article of Amendment to the Constitution of the United States, and is null, void and of no effect.

"*4.* That in fact and in truth no notice of any kind whatsoever was given to anybody or in any manner of the hearing for said purported and attempted appointment of a guardian of the person, property and estate of said relator, Leonard D. Ingram, and that said purported and attempted appointment of a guardian of the person, property and estate of said relator, Leonard D. Ingram, is therefore null, and void and of no effect both under the Constitution and laws of the State of Oklahoma, and under the Constitution and laws of the United States." (R. 3.)

In connection with these allegations it is proper to consider that the second amended bill as originally filed contained this allegation: "That said relator, Leonard D. Ingram, was born on the 30th day of July, 1903, and was on the 3rd day of January, 1911, a minor." This statement, however, was stricken from the second amended bill by order authorizing same March 25, 1925. (R. 2.) It should also be noted that the allotment deed and the homestead deed attached as Exhibits A and B to the amended bill show that Leonard D. Ingram, the allottee, was enrolled upon the Newborn Creek Freedman rolls. (R. 8, 9.) He therefore must have been born subsequent to July 1st, 1900, as he was enrolled pursuant to the Supplemental Creek Agreement, Act June 30, 1902, chapter 1323, 32 Statutes 500, section 7, which provides:

> "All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1, 1901, subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission."

(The period was extended to March 4, 1905, by the Act of March 3, 1905, chapter 1479, 33 Statutes 1048; and further extended to March 4, 1906, by section 2 of the Act of April 26, 1906, chapter 1876, 34 Statutes 137.)

In connection with the alleged lack of notice, Exhibits D and E (R. 14 to 17) should also be taken into consideration. These were attached to the bill by amendment when the cause came on for hearing upon the motion to dismiss. (See Journal Entry of Judgment, R. 17.) Exhibit D is a copy of the order for hearing the petition for the appointment of the guardian of Leonard D. Ingram, and shows

that the court ordered that the petition be set for hearing on the 3rd day of January, 1911, and that notice be given by posting in three public places in Wagoner County. (R. 15.) Exhibit E is the notice of the hearing, and shows that it was dated December 15, 1910, and is notice that the hearing will be had on the 3rd day of January, 1910. (R. 16.) Attached to it is the proof of service, which shows that on December 16, 1910, the notice was served on Lulu Curtis, Nancy Curtis, Leonard D. Ingram, Margaret Ingram and Minerva Ingram, "all next of kin and persons who have the care of said minors, by mailing to them and each of them, postage prepared, a copy of said within notice," also by posting in three public places in Wagoner County. This return of service was sworn to on January 3, 1911. (R. 16, 17.)

These exhibits having been made a part of the bill by amendment, and there being no allegation that the return of service was false, we take it that the claim that no notice of any kind was given to Leonard D. Ingram of the hearing upon which the court appointed the guardian, and that no notice of any kind was given to anybody in any manner of said hearing, must be read and construed in connection therewith and must be deemed merely a claim that the notice was defective in that it fixed the date January 3, 1910, for the hearing, whereas the hearing was had on January 3, 1911. In other words, the bill properly construed, is not based upon the contention that no notice of any kind was given, but that the notice which was given contained an improper date.

The amended bill further claims that the oil and gas leases were void for the reason that Minerva Ingram was not the guardian; that no notice of any kind was given of

the purported sale of the oil and gas leases; that the respondent was not the purchaser of the same; and that the oil and gas leases purport to have been executed for an indefinite period beyond the minority of Leonard D. Ingram and that they thus deprive Leonard D. Ingram of his liberty and property without due process of law and deny him the equal protection of the law; and upon the further ground that the guardian had no power to execute, nor did the County Court have power to approve, said oil and gas lease.

It was also claimed in the amended bill that because of the restrictions against alienation imposed by the Creek Agreement, Congress was without power to repeal said restrictions, and in so doing deprived Ingram of his property without due process of law.

Nowhere in the bill is it specifically or otherwise claimed that Leonard D. Ingram, at the time a guardian was appointed for him, was in fact other than an infant. It is not shown by direct averment in the bill that Minerva Ingram, the guardian appointed for him, was in fact his mother, but we believe this appears by inference, as Exhibit C to the bill (R. 12)—the order granting petition to transfer cause to Muskogee County, Oklahoma—shows that in March, 1920, Minerva Jones was the mother of Leonard D. Ingram, and that Leonard D. Ingram's then guardian, C. Jones, was his stepfather, and that Minerva Jones was then his custodian. Minerva Ingram was the person having the care of said minor according to the proof of service of the notice for hearing application for the appointment of guardian.

This Minerva Jones is one of the trustees who filed this action, and is one of the appellants here.

ARGUMENT.

I.

The claim that the sale of an oil and gas lease is the sale of real property and that the procedure prescribed for the sale of real estate of a minor must be followed, has been denied by both the Supreme Court of Oklahoma and the Circuit Court of Appeals for the Eighth Circuit, and the contrary has become a rule of property in Oklahoma.

The question was first presented to the Supreme Court of Oklahoma in *Duff* v. *Keaton,* 33 Okl. 52, 124 Pac. 291, wherein the contention now made by appellants was made. In answer to this the Supreme Court of Oklahoma says:

> "A lease granting oil and gas mining privileges for a term of years is not a 'sale of realty' as contemplated by section 314, Compiled Laws, 1909." (This section providing for the sale of real estate by a guardian.)
>
> "A lease for such purposes made by the guardian of a minor, permission of the court having first been obtained thereto and such lease having been approved and confirmed by the court though without the preliminary notices essential for the order of sale and confirmation of the same in case of the sale of real estate of minors by guardians, is valid against collateral attack."

The court also made this statement in that case:

> "In the argument of this case before this court the statement is made without denial that hundreds of acres of land belonging to minors in Eastern Oklahoma have been explored under contracts similar to this approved by the County Courts under similar pro

cedure; that the County Courts of said section of the state where oil and gas have been found have uniformly construed section 5314, Compiled Laws, 1909, as not applying to an oil and gas lease; that the District Courts where the question has been raised have also put a like construction thereon; and that the Secretary of the Interior has uniformly recognized as legal and valid leases of minors approved under the procedure in this case in the conduct of his office relative to the guardianship of the Federal Government over the Indian. * * * The rule here sought to be invoked would strike down every lease, it matters not how much investment had been honestly made under it, and probably bring about chaotic conditions in the development of one of the great industries of this state."

This case was followed by *Allen* v. *Midway Oil & Gas Company,* 33 Okl. 91, 124 Pac. 296, on substantially the same facts.

In *Cabin Valley Mining Company* v. *Hall,* 53 Okl. 760, 155 Pac. 570, an oil and gas lease and a subsequent extension agreement extending the lease beyond the minority of the minor, were sought to be set aside. The record in that case shows that the extension agreement was made in the same manner that the lease involved in this case was made. The Supreme Court of Oklahoma upheld the agreement.

In *Hoyt* v. *Fixico,* 71 Okl. 103, 175 Pac. 517, the record on file in the case shows that the petition for the lease was filed the same day upon which the lease was executed. That lease was upheld.

In *Papoose Oil Co.* v. *Swindler,* 95 Okl. 264, 221 Pac. 506, an extension lease upon producing property was attacked upon this very ground. The Supreme Court of Oklahoma expressly held that the provisions of the

statute for the sale of real estate did not apply to the sale of an oil and gas lease, even though, as was shown in that case, the lease was upon producing property.

In *Jackson* v. *Gates Oil Company,* 297 Fed. 549, the Circuit Court of Appeals for the Eighth Circuit held:

> "An order of a probate court, approving a gas lease of allotted Oklahoma lands, not including the homestead, executed under the Act of May 27, 1908, by the guardian of a full-blood minor Choctaw Indian, is the only order required to render the lease valid, notwithstanding provisions of Oklahoma statutes relative to sales of lands of minors and the rule adopted by the Secretary of the Interior under section 2, purporting to require a probate order authorizing guardians to make a lease, and an order confirming the lease, in view of sections 2 and 6 evincing a clear purpose to empower the Secretary to approve the lease, if in his judgment it is to the best interests of the minor to do so, when executed in compliance with local procedure."

The court, after discussing the cases hereinbefore cited, said, with reference to *Papoose Oil Co.* v. *Swindler, supra:*

> "It is pointed out that as early as *Duff* v. *Keaton* it was held that the Statutes of Oklahoma were entirely lacking as to any specific provision for procedure by the guardian in leasing the lands of his ward for agricultural, grazing or commercial purposes or for exploring for oil or gas, and that it was held in that case that the only statutory provision applicable to the subject was one requiring that the probate court make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects of the ward as cir-

cumstances require, and that the approval by the probate court of a lease by a guardian was all that was required, that neither competitive bidding nor notice nor prior authorization of the court was necessary. It was then said: 'Although this court *In re Indian Territory Illuminating Oil Co.*, 43 Okl. 316, 142 Pac. 997, held that an oil and gas lease was undoubtedly property, and in *Treese* v. *Shoemaker*, 80 Okl. 235, 195 Pac. 766, it is stated that an oil and gas lease vests the lessee with "a present vested interest in the land," and in *Tupeker* v. *Deaner*, 46 Okl. 328, 148 Pac. 853, and in *Bentley* v. *Zelma Oil Co.*, 76 Okl. 116, 184 Pac. 131, and in *Pluto Oil & Gas Company* v. *Miller*, 219 Pac. 303, * * * an oil and gas lease is a conveyance of interest in land, yet those cases are not in conflict with the holding in the *Duff* v. *Keaton* case that the execution of an oil and gas lease is not a sale of real estate, neither does the lease convey the oil and gas in place so as to be a sale of personal property. *Kolachny* v. *Galbreath*, 26 Okl. 722, 110 Pac. 902, 38 L. R. A. (N.S.) 451; *Frank Oil Co.* v. *Bellview Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N.S.) 487; *Priddy* v. *Thompson*, (Okla.) 204 Fed. 955, 123 C. C. A. 277.'

"We are thus persuaded that appellant's principal contention is not sound, and are of opinion that the probate order approving the lease in question was the only order required."

In *Clayton* v. *Tibbens*, 298 Fed. 18, the question here presented was directly involved. Circuit Judge SANBORN recites that it was claimed by appellee in that case that it was the custom and practice of guardians of wards and of County Courts of Oklahoma to make and approve oil and gas leases and agreements for the extension thereof, not according to the procedure for the sale of real estate, but in accordance with the procedure followed in this case, from

the admission of Oklahoma into the Union until July 15, 1914, when the Supreme Court of Oklahoma put into effect Probate Rule 9 (47 Okl. XIV, XVI) which required the sale of such leases in open court to the highest bidder; that it was the general opinion of attorneys that leases and extensions thereof were valid, and that titles to property of the value of many millions of dollars rest upon such leases and such extensions of leases, and that if such leases and such extensions were held void because not made according to the procedure prescribed for the sale of real property, great losses would be sustained by those holding property under such leases and much disturbance of titles thereto would result. Concerning this contention he said:

> "The evidence in this case convinces that such losses and such a disturbance of titles will be the unavoidable consequence of the establishment now of a rule of law that leases and extensions of leases by guardians of minors made prior to the effective date of rule 9—July 15, 1914—pursuant to the proceedings of the nature of that pursued by the County Court in this case, were unauthorized and void."

Concerning the contention that the lease was in effect the sale of real estate and could only be validly made after a sale following the procedure prescribed for the sale of real estate, he said:

> "The decision of the question whether the agreement of extension of the lease in this case was valid or void was and is a question of local state law, conditioned entirely by the true construction and application of the relevant statutes of that state.
>
> "In cases depending upon the constitution or laws of a state, the construction thereof by the highest ju-

dicial tribunal of that state establishing a rule of property is controlling authority in the courts of the United States where no question of right under constitutional laws or treaties of the Nation and no question of general or commercial law is involved. (Citing authorities.)

"The highest judicial tribunal of the State of Oklahoma by its opinions and decisions has so construed and applied the statutes of that state relevant to the question in this case as to establish a rule of property to the effect that the agreement of extension of the guardian's lease 'as long as oil, or gas or gasoline, or either of them, is produced or saved from the premises' was and is valid and not void. *Duff, et al.*, v. *Keaton, et al.*, 33 Okl. 92, 94, 97, 98, 99, 100, 124 Pac. 291, 42 L. R. A. (N.S.) 472; *Allen* v. *Midway Oil & Gas Company*, 33 Okl. 91, 124 Pac. 296; *Cabin Valley Mining Co.* v. *Hall*, 53 Okl. 760, 765, 767, 768, 769, 773, 155 Pac. 570, L. R. A. 1916-F, 493; *Hoyt* v. *Fixico*, 175 Pac. 517, 518; *Carlile* v. *National Oil & Development Co.*, 83 Okl. 217, 219, 224, 226, 227, 229, 231, 232, 201 Pac. 377; *Winona Oil Co.* v. *Barnes*, 83 Okl. 248, 249, 250, 253, 200 Pac. 981; *Papoose Oil Co.* v. *Swindler*, 221 Pac. 506, 507, 508, 509. The opinion of the Supreme Court of Oklahoma in the case last cited approves the exhaustive and convincing opinion of the District Court below in this case, *Tibbens* v. *Clayton*, 288 Fed. 393, and that opinion and decree is in accord with the rule of property applicable to this and like cases deliberately established by the decisions and opinions of that court which have been decided."

The question sought to be presented by this issue, therefore, this court will readily see has become an established rule of property in Oklahoma—established not only by the opinions of the Supreme Court of the State of Oklahoma covering a period of years, but confirmed and approved by the decisions of the Circuit Court of Appeals for the Eighth Circuit. To disturb it now would undoubt-

edly, as Circuit Judge SANBORN states, disturb many titles to oil and gas leases in Oklahoma.

II.

The appointment of the guardian for the person and property of Leonard D. Ingram was a valid appointment, upon sufficient notice, and no constitutional rights were denied him in respect thereto.

The questions sought to be presented under what is designated Issue II and Issue V in appellants' brief we think can be better considered as one question. We therefore will undertake to answer it as though one question were involved.

POINT 1.

The requirements of the Oklahoma law as to notice for the appointment of a guardian for a minor.

Section 1431, Compiled Oklahoma Statutes, 1921, provides:

> "The County Court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either, or both of them, of minors who have no guardian legally appointed by will, or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person in behalf of such minor. Before making the appointment the judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor."

In *Lester* v. *Smith,* 83 Okl. 143, 200 Pac. 780, this statute was before the Supreme Court of Oklahoma for con-

struction. It appeared in that case that the County Court ordered that notice of the application for the appointment of the guardian be given by posting in three public places; that notice was posted in three public places. On the day the matter was set for hearing the minor, who was over fourteen years of age, also filed his nomination of the applicant as guardian. The court in discussing the section of the statute we have above quoted, says:

> "In *Asher* v. *Yorba, et al.*, 125 Cal. 513, 58 Pac. 137, the Supreme Court of California had this same section of the statute under consideration, and laid down the following rule:
>
> > 'Under Code Civ. Proc., par. 1747, providing that before making appointment of a guardian the court must cause such notice as it deems reasonable to be given to the person having care of the minor, and such relatives as the court may deem proper, posting of notice for ten days in three public places under direction of the court is sufficient.
> >
> > 'Under Code Civ. Proc., par. 1747, providing that before the appointment of a guardian, notice shall be given to such relatives of the minor residing in the county as the court may deem proper, the court has authority to give notice by posting for ten days in three public places.'
>
> "The probate procedure of Oklahoma was acquired from California. California construed this section in 1899, when the above opinion was rendered by the Supreme Court. It is presumed that the Legislature of Oklahoma knew of this decision of the Supreme Court of California, and adopted the above statute with full knowledge of this decision. Therefore, this decision is very persuasive with us. We think the notice was sufficient."

In *Ross, et al.*, v. *Groom, et al.*, 90 Okl. 270, 217 Pac. 480, it appeared that the only notice given was a notice by publication for two weeks in a weekly newspaper. After quoting the section of the statute above given the Supreme Court of Oklahoma says:

> "The defendants earnestly insist that this statute contemplates personal service of notice on the relatives of the minor residing in the county and persons having the care of the minor. * * * The statute which controls the instant case is identical with the California statute, and this statute has received consideration by courts of that state in numerous decisions and there is no reason why the same should not be followed by this court, especially in view of the fact that probate sales in this state since statehood have been made according to the interpretation placed on this statute by the California court. In *Asher* v. *Yorba, et al.*, 125 Cal. 513, 58 Pac. 137, notice of the hearing on the application for appointment of guardian was given by posting notices in three public places for ten days, and in holding that this notice was a sufficient compliance with the statute the court said: 'It is claimed that under the section of the law quoted notice of the hearing must be personally served by citation upon the relatives of the minor residing in the county. We fail to see that the statute makes such a demand. The statute does demand that the relatives living in the county, if the court deem proper, must be given such notice as the court deems reasonable. If the court deems a notice for ten days by posting in three public places a reasonable notice to them, it would seem within the power of the court to so declare. The statute clearly implies that the kind or character of the notice to be given is a matter for the judge to determine, and that a personal notice is not absolutely demanded by the provision quoted.'

"In *Burroughs* v. *DeCouts,* 70 Cal. 361, 11 Pac. 739, it is said: 'The manner in which the notice shall be given to the relatives of the minor residing in the county is left to the judgment and reasonable discretion of the probate judge.'

"*In re Lunberg,* 143 Cal. 402, 77 Pac. 156, the court said: 'So far as the provisions of the statute relative to the appointment of guardians is concerned, it must be conceded, we are satisfied, that notice to a parent of the minor is not in all cases essential to the jurisdiction of the court to appoint a guardian; and this for the simple reason that the statute does not require that such notice must in all cases be given to a parent. Undoubtedly a parent should be notified, where possible, of proceedings, the effect of which may be to terminate his parental authority; and undoubtedly, where such notice is not required to be given, a parent would be entitled, upon seasonable application, to be heard upon the question as to whether the appointment of another as the guardian of his child, without his knowledge, should not be set aside, that he might be heard upon the question of the necessity of appointing such other as guardian.'

"Further in the opinion, we find the following language: 'Under this provision of the statute, no notice to relatives of the minor residing without the county is essential to the jurisdiction of the court; and it is further settled that, as to relatives residing within the county, it is for the Superior Court, in its discretion, to determine what relatives shall be notified, and how they shall be notified.'

"In *Crosbie* v. *Brewer,* (Okl. Sup.) 158 Pac. 388, this court said: 'Plaintiffs next contend that section 6522, Revised Laws, 1910, requires written personal notice to be given to the relatives in the county. That part of the statute referred to reads as follows: "Such ap-

pointment may be made on the petition of a relative or other person in behalf of such minor. Before making the appointment the judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor." In the case at bar the court caused three written notices to be posted up in three public places in the county, and plaintiffs argue that this was only constructive notice and was not the notice intended by the above statute. It seems it was the intenion of the law to leave the nature of the notice to the discretion of the county judge, and the only notice required to be given was one deemed reasonable by the judge.'

"*In re Morhoff's Guardianship,* 179 Cal. 595, 178 Pac. 294, the following language is used in the syllabus: 'Father was not entitled to formal notice of proceeding for appointment of general guardian of minor daughter; such notice not being jurisdictional prerequisite to court's action, under Code Civ. Proc., par. 1747.'

"*In re Lundberg, supra,* it is said: 'We have found no case in which it was held that an appointment of a guardian of the person of a minor, made in accordance with all statutory requirements, was void for want of actual notice to a parent, and open to collateral attack.'

"It seems to us that according to the plain language of the statute the only notice required to be given is such as the county judge deems reasonable."

The case last above mentioned was followed in *Johnson* v. *Furchtbar,* 96 Okl. 114, 220 Pac. 612, and in *Crabtree* v. *Bath,* 102 Okl. 1, 225 Pac. 929.

In *Ross* v. *Breene*, 88 Okl. 37, 211 Pac. 417, it was held that the provision of the statute above quoted is mandatory and that notice of some kind was required to be given.

It will thus be seen that the law of Oklahoma requires that notice to relatives residing in the county and to any person having care of the minor must be given, but the kind of notice so to be given is left to the discretion of the county judge, who must cause such notice as he deems reasonable to be given them.

POINT 2.

The clerical error in giving the wrong year in the notice for hearing did not invalidate it.

As pointed out in the statement of the case, the second amended bill of the plaintiffs in this cause, although alleging that no notice of any kind was given of the hearing for the appointment of a guardian for Leonard D. Ingram, shows as an exhibit to the bill the notice which was given, and that notice was given both by posting in three public places in accordance with the order of the county judge, as well as by personal service by mailing a copy of the notice to Leonard D. Ingram and Minerva Ingram and to the other minors for whom Minerva Ingram was at the time applying to be appointed guardian. (R. 16.) As it is not claimed that this proof of service was false in any particular, we take it that the allegations as to want of notice must be construed really as an allegation to the effect that since the notice given stated that the hearing would be on the 3rd day of January, 1910, whereas the hearing was really had on the 3rd day of January, 1911, it amounted to no notice whatever.

The second amended bill together with its exhibits show that the application of Minerva Ingram to be appointed guardian of these minors was filed in the County Court on December 15, 1910, and on that day the county judge made an order setting it for hearing on the 3rd day of January, 1911 (R. 14, 15). That on the 15th of December, 1910, the county judge issued a notice of hearing of application for appointment, wherein it was recited that the hearing would be had on the 3rd day of January, 1910 (R. 16). This was posted and mailed on December 16, 1910 (R. 17). It is clear that no one receiving this notice could have been misled by the clerical error in naming the date for hearing as in January, 1910, rather than January, 1911, for the notice upon its face showed that it was issued on the 15th of December, 1910, and therefore it was plainly intended a notice of a hearing in the following January. Such a clerical error, not tending to mislead anyone, would not operate to make the appointment of the guardian based upon such notice void.

In *Kelly* v. *Harrison*, 12 Sou. 261, the Supreme Court of Mississippi held that a summons issued in December, 1883, advising the defendant to appear at the next term of court to be held "on the first Monday of January, 1883," was valid since it appeared upon its face that the defect in the date was a mere clerical error which could be amended on motion. The court said:

> "Neither the summons nor the return was a nullity because of the defects pointed out by the appellant. Each was a mere irregularity, amendable if attention had been called to it, and if not amended, presenting only the question of error or no error on direct appeal from the judgment rendered by the court, but not affecting its validity on a collateral attack. By the writ,

if served upon him, the defendant was advised that he was being pursued by a particular person, upon a particular demand, in a certain court, to be held at a certain place, and whose terms were fixed by law. A mere inspection of the paper would have shown the mistake of fixing the next term of the court as to be held on the first Monday of January, 1883 (then long passed) instead of the first Monday of January, 1884, resulted from clerical error; and he was bound to take notice of the law that the defect might, under the order of the court, be amended by inserting in the process the true date. So also if the service had actually been made upon him and he had seen the writ with return of the special officer upon it, he was bound to know that the return was but the evidence, provided by law for the fact of service, upon which the jurisdiction of the court over his person depended, and that it, if irregular, might also be amended according to the facts. Mere irregularities in the process, or the service of process, or the return thereof, do not affect the jurisdiction of the court over the person of the defendant."

See, also, *T. A. Howard Lumber Co.* v. *Hopson,* (Miss.) 101 So. 363.

In *Scarborough* v. *Merrick,* (Neb.) 66 N. W. 867, a notice by publication required the defendant to answer on or before the 16th day of March, 1892, a date prior to the first publication and to the actual filing of the petition in the District Court. It was said:

"By statute the time for filing answer is fixed 'on or before the third Monday after the return day of the summons or service by publication.' The notice in question is manifestly defective. It should have required the defendant to answer on or before the third Monday after the completed service. The defect indicated did not invalidate the notice to such an extent

> as to prevent the court from acquiring jurisdiction or to render the proceedings absolutely void. It was a mere error or irregularity, not available in a collateral attack of the decree, but constituting sufficient ground for a reversal in a direct proceeding like this, or to set aside the decree under the third subdivision of section 602 of the code, which authorizes a District Court to vacate its own judgments or decrees after the term at which the same was entered 'for mistakes, neglect, or omissions of the clerk, or irregularity in obtaining a judgment or order'."

And see *Guptill* v. *Horne,* 63 Me. 405. See generally, note in 6 A. L. R. 841.

In *Hines, Director General,* v. *Bacon, County Treasurer,* 91 Okl. 55, 215 Pac. 1048, action was brought to collect taxes paid under protest under statute requiring service of summons to be made upon the treasurer within thirty days after the taxes were paid in order for plaintiff to maintain its action. Action was brought and summons served within the thirty days. The summons was dated July 5, 1919, return day was therein designated as August 4, 1919, and answer day was likewise designated August 4, 1919. The Oklahoma statute required answer day to be made twenty days after the return day. A motion to quash the summons was filed and sustained. The Supreme Court reversed this and said:

> "If the trial court shall be sustained, then the plaintiffs are denied their day in court solely because of a clerical error of a public official which in no way affects the substantial rights of the defendant, and that, too, when the interests of the public official making the error are identical with that of the defendant. Section 4791, Rev. Laws, 1910 (section 319, Compiled Laws, 1921), provides: 'The court, in every stage of action

must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.'

"The question of the irregularities of the summons has been before this court a number of times. In *Lawton* v. *Nicholas,* 12 Okl. 550, 73 Pac. 262, the summons was made returnable 12 days from the date it was issued. This was treated as an irregularity not voiding the summons. In *Aggers* v. *Bridges,* 31 Okl. 617, 122 Pac. 170, the notice by publication required the defendant to answer in 36 days from the first publication instead of the 41 days given by a statute. It was held that the motion to quash should have been sustained upon the ground that it deprived the defendant of a substantial right given him by statute. In *State, ex rel. Collins,* v. *Parks,* 34 Okl. 335, 126 Pac. 242, the summons was made returnable 10 days, and answer day 20 days, from the date it was issued. The summons was held void for the same reason.

"In *Continental Ins. Co.* v. *Norman,* 176 Pac. 211, the summons was directed to the sheriff of another county than the one where issued, and made returnable in 5 days from the day it was issued. It was held that the trial court did not err in overruling the motion to quash although the statute provided that in such case the summons should be made returnable not less than 10 days nor more than 60 days from the date issued. Justice RAINEY, writing the opinion, after reviewing *Agger* v. *Bridges* and *State, ex rel. Collins,* v. *Parks, supra,* as well as the Kansas cases, said: 'The principle of law announced in these cases is sound, but is not applicable to the case under consideration; for, while it is clear that the provisions of the code giving the defendants a fixed period of time within which to plead, which were under consideration in the cases cited, were for the benefit of the defend-

ants served, it is equally clear that the provisions of section 4707, Rev. Laws of 1910, fixing the time within which the officer shall serve and return the summons, are solely for the benefit of the officer to whom the summons is directed. * * * We conclude then that, while the summons was irregular, the defendant was neither deprived of any statutory right nor prejudiced in any way, and was not in a position to complain of its irregularity. Therefore the court did not err in overruling the motion to quash.'

"In this case the defendant had more than 20 days from the return day, as indorsed on the summons, in which to answer. He had 28 days from the day the summons was actually served. The clerical error of the court clerk did not deprive the defendant of any substantial right or mislead him to his detriment."

It being apparent upon the face of the notice served in this case that it was dated and issued in December, 1910, and purported to give notice of a hearing to be held in the future, the clerical error in the date for the hearing whereby the wrong year was given could not have misled anyone, and therefore the contention that the notice was void cannot be sustained.

POINT 3.

No notice to the minor was required, and the presumptions arising from the appointment of a guardian establish that notice sufficient was given.

We have shown under Point 1 above that notice of the hearing of the application for appointment of a guardian is only required upon such of the next of kin as the county judge may designate and the person having the custody of the minor. In the statement of the case we have shown that the inference from the second amended bill and

the exhibits thereto is that Minerva Ingram, the applicant for appointment as the guardian, was the mother of Leonard D. Ingram and the person in whose care he then was. There is no allegation in the bill that Leonard D. Ingram was in the care or custody of anyone other than Minerva Ingram at the time the application was made. There is no allegation in the bill that he had any relatives residing in Wagoner County, wherein the appointment was made, other than Minerva Ingram at the time the application for appointment was made. There is no showing, therefore, that there was anyone other than Minerva Ingram at that time who came within the class designated by the law as those upon whom notice of the hearing for the application for appointment should be given. The presumption arising therefore from the fact of appointment must be that Minerva Ingram, the applicant, was the only person upon whom the law required notice to be served. This was so held by the Supreme Court of Oklahoma in a somewhat similar case, namely: *Baker* v. *Cureton,* 49 Okl. 15, 150 Pac. 1090, wherein the court said:

> "It seems as this appointment was made on the petition of Hawkins (the applicant for appointment as guardian) that the point is well taken and that the notice contended for was required by the statute. But let that be as it may, assuming that it was necessary to its validity that the judge gave notice of the appointment of Hawkins 'to any person having the care of Ballard' and 'to such relatives of the minor residing in the county as the judge may deem proper,' while it might be said from the face of the record that no such notice was given, can we not indulge the presumption from the fact of the appointment that the court heard evidence and found every fact necessary to justify the appointment? In other words, the County

> Court of Wagoner County, being a court of general jurisdiction as to probate matters and its records entitled to have accorded them the effect and legal presumption in favor of the validity of the appointment, it not appearing on the face of the record that Ballard had relatives residing in the county or was in the care of anyone, can we not presume that, his father and mother being dead, he was in the care of no one and had no relatives living in the county and that hence there was no one to whom the judge could give the notice prescribed by said section? We can and will; and hold that the record and proceedings of the County Court cannot be collaterally attacked as is here attempted by evidence *aliunde* in effect that he was at the time in the care of someone and had relatives residing in the county upon whom the notice should have been served."

After discussing other authorities the court then proceeds:

> "And so we say that as Ballard may not have been in the care of anyone, or perchance Hawkins had the care of this minor at the time he came into court with him and was nominated as his guardian, and as perchance Ballard at the time had no relatives residing in the county upon whom the notice could have been served, the court did right to refuse to set aside the order of appointment as void on its face and to hold the guardian's deed good to pass the title of the minor to the land in question."

So in the absence of a showing here that Ingram at the time had relatives residing in the county or was in the custody of someone in the county upon whom notice should have been served, might it not as well be presumed that Minerva Ingram was the only person upon whom notice should have been served, and that she was the applicant for letters of guardianship?

It therefore would be immaterial to determine in this cause whether or not the notice with the clerical error as to the date of hearing therein was void or valid, since the presumptions which will be indulged in support of the jurisdiction of the court establish that the applicant, Minerva Ingram, was the only person entitled to notice, and of course she had notice when her petition was set for hearing by the County Court for January 3, 1911. (R. 14.)

> "The appointment of a guardian for a minor by the County Court imports general jurisdiction in the court so to do, and the record thereof being regular upon its face, it will be inferred from the fact that such appointment was made that all the facts necessary to vest the court with jurisdiction to make the appointment, including the determination of the proper qualification of the guardian appointed, had been found to exist before such appointment was made."
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> —*Bank of Ingersoll* v. *Dresia*, 103 Okl. 166, 229 Pac. 567, and authorities cited.

POINT 4.

Notice to an infant of proceedings for the appointment of a guardian for him and his property is not required by the Constitution of the United States.

It is claimed that since the Oklahoma statute does not require notice to the minor of the application for the appointment of a guardian and since it authorizes a guardian duly appointed to make conveyances for the minor's benefit of his property, that the appointment of a guardian for Leonard D. Ingram deprived him of his property without due process of law. The fallacy in the appellants' argument lies in the fact that they fail to distinguish between the power of the Legislature, acting as *parens patriae* in respect to minors and for their benefit, and in prescribing

rules of procedure for contests between adversary parties. Judge COOLEY in his classic work upon Constitutional Limitations (third ed. 106), states:

> "Whenever it becomes necessary or proper to sell the estate of a decedent for the payment of debts, or of a lunatic or other incompetent person for the same purpose, or for future support, or of a minor to provide the means for his education and nurture, or for the more profitable investment of the proceeds, or of tenants in common to effectuate a partition between them, it will probably be found in every state that some court is vested with jurisdiction to make the necessary order, if the facts seem to render it important after a hearing of the parties in interest. The case is eminently one for judicial investigation. There are facts to be inquired into, in regard to which it is always possible that disputes may arise; the party in interest is often incompetent to act on his own behalf, and his interest is carefully to be inquired into and guarded; and as the proceeding will usually be *ex parte*, there is more than the ordinary opportunity for fraud upon the party interested, as well as upon the authority which grants permission. It is highly and peculiarly proper therefore that by general laws judicial inquiry should be provided for these cases, and that these laws should provide for notice to all proper parties, and an opportunity for the presentation of any facts which might bear upon the propriety of granting the applications.
>
> "But it will sometimes be found that the general laws provided for these cases are not applicable to some which arise; or if applicable, that they do not always accomplish fully all that seems desirable; and in these cases, and perhaps also in some others without similar excuse, it has not been unusual for legislative authority to intervene, and by special statute to grant the power which under the general law is grant-

ed by the courts. The power to pass such statutes has often been disputed, and it may be well to see upon what basis of authority as well as of reason it rests.

"If in fact judicial inquiry is essential in these cases, it would seem clear that such statutes must be ineffectual and void. But if judicial inquiry is not essential and the legislature may confer the power of sale in such a case upon an *ex parte* presentation of evidence, or upon the representations of the parties without any proof whatever, then we must consider the general laws to be passed, not because the cases fall within the province of judicial action, but because the courts can more conveniently consider and properly, safely and inexpensively pass upon such cases, than the legislative body where the power primarily rests.

"The rule upon this subject as we deduce it from the authorities seems to be this: If the party standing in the position of trustee applies for permission to make the sale, for a purpose apparently for the interest of the *cestui que* trust, and there are no adverse interests to be considered and adjudicated, the case is not one which requires judicial action, but it is optional with the legislature to grant the relief by statute, or to refer the case to the courts for consideration, according as the one course or the other on considerations of policy may seem desirable."

After quoting from some decisions Judge COOLEY then proceeds:

"This species of legislation may perhaps be properly called prerogative remedial legislation. It hears and determines no rights; it deprives no one of his property. It simply authorizes one's real estate to be turned into personal on the application of the person representing his interests, and under such circumstan-

ces that the consent of the owner, if capable of giving it, would be presumed. It is in the nature of the grant of a privilege to one person, which at the same time affects injuriously the rights of no other.

"But a different case is presented when the legislature assumes to authorize a person, who does not occupy a fiduciary relation to the owner, to make sale of real estate, to satisfy demands which he asserts but which are not judicially determined, or for any other purpose not connected with the convenience or necessity of the owner himself."

This court in *Hoyt* v. *Sprague*, 13 Otto. 613, 103 U. S. 633, in discussing the power of the Legislature with reference to estates of minors, said:

"The question of the power of the Legislature, when not restrained by a specific constitutional provision, to pass special laws, has been much mooted in the courts of this country; and it would subserve no useful purpose to go over the whole ground of controversy on this occasion. Suffice it to say, that laws of this character, for the purpose of healing defects, giving relief, aid, and authority in cases beyond the force of existing law, have been frequently passed in almost every state in the Union, and have received the sanction not only of this court, but of other courts of high authority. The exercise of this power has been most conspicuous in that class of cases in which the Legislature has been called upon to act as *parens patriae* on behalf of lunatics, minors, and other incapacitated persons. Laws authorizing the sale of the estates of such persons have frequently been passed, and have been upheld as fairly within the legislative power. The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But

when it is not confided to the courts, the power exercised is of a legislative character, the Legislature making a law for the particular case. In some modern constitutions the exercise of this power has been prohibited to the legislative department. But where not so prohibited, and where it has never been authoritatively condemned in the jurisprudence of the state, we cannot deny to the Legislature the right to exercise it in those cases in which it has been accustomed to be exercised, amongst which we think the present case may be fairly reckoned. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given."

The appointment of a guardian for an infant is for the purpose of caring for his property, providing for his maintenance and education, and generally for the welfare of the infant himself. Such proceedings are not adversary in character and do not deprive the infant of any property nor of his liberty as meant by the constitution. Thus in *Kurtz, et al.*, v. *St. Paul & D. R. Co.*, 51 N. W. 221, the Supreme Court of Minnesota said:

"The power to appoint a guardian of the estate of a non-resident minor situated in this state is unquestioned, and the purpose of so doing it is the same as in appointing a guardian of the person and estate of a resident minor. Notice of the hearing for such appointment is not a constitutional prerequisite to the jurisdiction to name a guardian. Appointing a guardian deprives no one of his property and does not change or affect the title of it. Letters of guardianship are merely a commission which places the property of the ward in the care of an officer of the court as custodian, and in its effect is not essentially different from the appointment of a receiver or temporary administrator,

a jurisdiction which can be and frequently is exercised before service of any process. The matter of notice of an application for the appointment of a guardian is therefore purely a matter of statutory requirement. * * * In the present case there is no question but that all the notice was given which the probate judge ordered, but the contention is that what the judge ordered was insufficient, because it did not include notice to the minors themselves. The statute clearly commits it to the sound discretion of the judge to decide how and in what manner notice shall be given, and to fix the kind of notice most likely to serve the ends of justice and protect the interests of the infants. Similar provisions in similar statutes are quite common, and it is agreed with one accord that the purpose is to give notice to relatives or next of kin who are naturally interested in the infants or their estates, so as to give them an opportunity to attend if they desire, for the purpose of giving the probate court the requisite information as to the nature and value of the estate of the infant and as to the propriety or impropriety of the appointment as guardian, of the person named in the petition. *Underhill* v. *Dennis,* 9 Paige 202; *White* v. *Pomeroy,* 7 Barb. 640; *Ex parte Dawson,* 3 Bradf. Sur. 130. Notice to the infants is not the important or essential thing, for the very necessity for appointing a guardian for them arises out of the fact that they are incapable of managing their own estate, or of determining for themselves what is for their own interests. If they are of very tender years, and strictly *non sui juris,* notice to them would be an idle ceremony, and utterly useless. Hence we conclude that the notice contemplated by statute does not necessarily require or include notice to the infants themselves, but that it is left to the sound discretion of the probate judge to order such notice to persons interested as natural guardians and next of kin as he shall deem

most likely to inform them of the application, and thus, through their attendance, advise him of the extent and condition of the infants' estate, and of the expediency of the appointment prayed for."

In *Appeal of Gibson,* 28 N. E. 296, the Supreme Judicial Court of Massachusetts said:

"The statute did not in terms require any notice of the proceedings or any nomination or consent on the part of the minor or of any person. We see no reason why in such cases notice should be held to be essential to the validity of the proceedings; and the history of the legislation on the subject in connection with the decisions and practice confirms this view. The judges of probate were empowered by the statutes of 1783, C. O. 38, sections 1, 2, to appoint guardians for minors and for insane persons. In neither case did the statute in terms require notice. The provisions regulating the appointment of guardians for minors have remained substantially the same. Rev. St., c. 79, Secs. 2, 3; Gen. St., c. 109, Secs. 2, 3; Pub. St., c. 139, Secs. 2, 3. In practice it has never been considered essential that notice should be given in the case of a minor under the age of fourteen years. But in the case of insane persons this court held in the case of *Chase* v. *Hathaway,* 14 Mass. 222, 224, that, notwithstanding the silence of the statute, no decree made under it, assigning a guardian for an idiot or lunatic, could be valid unless the party to be affected had had an opportunity to be heard. This decision was placed upon the ground that whenever the legislature has provided that on account of crime or misfortune the public safety demands a suspension of the essential rights of the individual to the enjoyment of his liberty and property, 'and has provided a judicial process by which the fact shall be ascertained, it is to be understood as required that the tribunal to which is committed the

duty of inquiring and determining shall give opportunity to the subject to be heard in support of his innocence or capacity.' *Chase* v. *Hathaway, ubi supra.* But in the case of a minor of tender years, whose person is by the law presumed to be in the care and custody of parents or other guardians, and who has not the right of dealing with his own property, these considerations do not apply."

In *Whittelsey* v. *Conniff*, 182 S. W. 161, 1 A. L. R. 913, the Supreme Court of Missouri held:

"An infant is not deprived of his property without due process of law or the equal protection of the laws by a sale of it for his benefit by a curator appointed without notice to the minor."

The court said that to the contention made that such an appointment violated the law there was one answer to be made:

"When the legislature, as *parens patriae*, takes from a minor the power to dispose of his property, and, through the instrumentality of the probate court and a curator, sells that property for the purposes of his education and support, it does not deny to him the equal protection of the laws, but gives him the benefit of laws especially designed for his protection; it does not take from him his property, but uses it for his benefit.

"In 1820, Chief Justice PARKER, in *Rice* v. *Parkman*, 16 Mass. 326, said: 'No one imagines that, under this general authority, the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him, if disabled from acting himself, a beneficial

change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do, and enabling him to derive subsistence, comfort, and education from property which might otherwise be wholly useless during that period of life when it might be most beneficially employed. If this be not true, then the general laws under which so many estates of minors, persons *non compos mentis,* and others have been sold and converted into money are unauthorized by the Constitution, and void; for the courts derive their authority from the legislature, and, it not being of a judicial nature, if the legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress who had unproductive property and were disabled from conveying it themselves, it would seem that one of the most essential objects of government, that of providing for the welfare of the citizens, would be lost.'

"In *Cochran* v. *Van Surlay,* 20 Wend. 365, 32 Am. Dec. 570, the court said: 'But, as I have frequently had occasion to observe, an act of the legislature which would have the effect to devest an individual of his property and transfer it to others for their own benefit, without compensation, or where there was no reason to suppose the person whose property was thus taken would be benefitted thereby, and contrary to the settled principles of law, would be void, as being against the spirit of our state constitution, and not within the powers delegated to the legislature by the people of this state. It is clearly, however, within the powers of the legislature, as *parens patriae,* to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other per-

sons who are incapable of managing their own affairs'."

To the effect that no notice to the minor is required, see:

Mahan v. *Steel,* (Ky.) 58 S. W. 446;
Shroyer v. *Richmond,* 16 Ohio St. 445;
Palmer v. *Oakley,* (Mich.) 2 Dougl. 433, 47 Am. Dec. 41;
Credle v. *Baughan,* (N. C.) 67 S. E. 46, 136 Am. St. Rep. 787;
Loftin v. *Carden,* (Ala.) 83 So. 174.

In the last case it was said:

"The minor being an infant only two years of age, it would have been useless, if not foolish, to serve it with notice—it could not have comprehended the object or effect of the notice."

Under the authorities above it is apparent that originally authority to authorize sales and conveyances of a minor's property was a legislative power and resided in the legislature. This authority has generally been delegated to the courts. The appointment of a guardian is but a preliminary step towards the care of the minor's property. In most cases it is a preliminary step to the sale of the minor's property for the benefit of the minor. It is a proceeding in the interest of the minor, and, as pointed out in the foregoing decision, does not deprive the minor of any rights which he might have. The minor is already prohibited by law from contracting with reference to his property or from conveying the same. The appointment of the guardian merely provides a means by which his property might be cared for, and if it be for the minor's best interest, sold and converted into personalty.

"The relation between guardian and the ward does not give the guardian a legal title to the ward's estate, but both the legal and beneficial title to personal and real property remains in the ward, and the power of the guardian is a naked trust, not coupled with an interest."

—*Title Guaranty & Surety Co.* v. *Cowan,* 71 Okl. 299, 177 Pac. 563;
Ischoner v. *Friar,* 105 Okl. 30, 231 Pac. 298.

The minor, by the appointment of the guardian, therefore, is not deprived of his property nor of his liberty nor of any other legal rights which he may have. Notice therefore to him of hearing an application for the appointment of the guardian was not required by any constitutional provision.

III.

That a guardian has power to execute, and the County Court to approve, a lease for oil and gas purposes beyond the minority of the ward is settled by the decisions of the Supreme Court of Oklahoma and by the Circuit Court of Appeals of the Eighth Circuit, and has become a rule of property in Oklahoma.

The question of the right to lease for oil and gas mining purposes beyond the minority of the ward was first presented to the Supreme Court of Oklahoma in the case of *Cabin Valley Mining Co.* v. *Hall,* 53 Okl. 760, 155 Pac. 570. In that case it was said:

"Section 11, Art. 7, of the Constitution provides for the establishment of a County Court in each county, which is declared to be a court of record, and prescribes the qualifications of the judge thereof and the

terms of his office. Section 12 of aritcle 7 provides that the County Court, coextensive with the county, shall have original jurisdiction in all probate matters, and until otherwise provided by law shall possess certain civil jurisdiction. Section 13, Art. 7, is as follows: 'The County Court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, * * * transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis* and common drunkards, including the sale, settlement, partition, and distribution of the estates thereof * * *.'

* * * * * * * *

"Much of the briefs of counsel is devoted to a discussion of the extent of jurisdiction formerly possessed by courts of probate and chancery courts at common law with reference to the management and control of the estates of minors, and many authorities are cited in which the courts have lavished much learning upon a discussion of this question; but, in view of the foregoing provisions of the constitution and the statutory provisions hereinafter set out, a review of these authorities is not here deemed necessary. It will only be necessary to direct attention to certain sections of the statute which, considered in connection with the constitutional provisions, *supra*, will determine the extent of the jurisdiction conferred upon the County Court.

"Section 6547, Revised Laws, 1910, is as follows: 'Guardians of infants and insane persons are hereby empowered to lease and grant mineral oil and mineral gas, in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court, as now provided by law, where such consideration is money.'

"Section 6569, provides: 'The County Court, on the application of a guardian or any person interested

in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's (property) in real estate, or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances (may) require.'

"And by section 3330 it is provided: 'In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward.'

"Section 6547 confers authority upon the guardians of infants to lease and grant mineral oil and gas in consideration of a royalty under the procedure now provided in the County Court for leasing of said lands where the consideration therefor was money. The procedure referred to is that prescribed by section 6569, *supra,* which requires the guardian to make application to the County Court, after notice in accordance with the directions of the judge, whereupon the court is authorized to make such orders and give such directions as are needful, and as the circumstances may require. *Duff, et al.,* v. *Keaton,* 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472. There is no limit in this section as to the terms of the lease, nor any limitation as to the time for which same may run; it being left to the judgment of the court, in the exercise of a sound discretion, to determine what is best for the interest of the minor under the circumstances.

* * * * * * * *

"The jurisdiction granted to the County Court being 'to transact all business appertaining to the es-

tates of minors,' and in cases where a guardian has been appointed 'the court making the appointment has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward,' this grant would be broad enough to authorize any act to be done or step to be taken that under the circumstances of the case, in the judgment of the court, would be for the best interests of the minor, including authority to authorize the making of a lease for oil and gas mining purposes by the guardian for the lands of his ward for a term extending beyond the minority of the ward. If it were not so, conditions might, and probably would, arise where the interests of the ward would be greatly jeopardized, and the value of his estate caused to suffer serious depreciation and loss for lack of that authority. Owing to the well known nature of oil and gas and the method of its production, it is frequently necessary in order to protect the interests of an owner that lands be promptly leased, and early exploration and development had to prevent serious loss to the estate by drainage of the oil and gas therefrom through adjacent properties. Where new territory is being developed, it is sometimes the case that at the beginning of the excitement attendant upon such discoveries larger sums are paid as a bonus for a lease than could be procured later, and the premises are leased upon better terms, if executed promptly, than could be had in the light of subsequent developments. In such an instance, if a minor be the owner of desirable property within probable or proven territory, and be within a few months or a year or so of his majority, the authority to execute a lease for a sufficient term of years to guarantee the lessee a reasonable return upon his investment would enable the guardian to secure a larger bonus and better terms than could otherwise be procured. It requires time to explore and develop lands for oil and gas mining op-

erations, and often an outlay of large sums of money in the way of drilling and other preparations for handling the product of the wells, and, if the lessee be confronted with the possibility of losing all his efforts and outlay at a time when the lease is just becoming productive and profitable, it is easy to see that the most advantageous terms cannot be had, and in some instances it is possible that lands could not be leased until the ward attains his majority, during which time the premises could be drained by operations upon adjacent property, and the value of the ward's estate be materially lessened. By leasing the premises and procuring the development of same the ward is deprived of nothing, but, on the contrary, his estate is enhanced in value, and his revenues increased, and upon becoming of age the authority of the guardian is terminated, and the minor comes into possession of an estate that is developed and producing an income which might not have been his under different circumstances.

* * * * * * * *

"Being vested with jurisdiction 'to transact all business appertaining to the estates of minors,' and being given the exclusive control of guardians in the management and disposition of the estates of their wards where a guardian has been appointed, it is a reasonable interpretation of these provisions to say that there is included therein that jurisdiction formerly possessed by courts of chancery.

* * * * * * * *

"The powers of a court of equity are stated thus in 2 Story, Equity Jurisprudence (13th ed.), Sec. 1341: 'The jurisdiction of the court of chancery extends to the care of the person of the infant so far as is necessary for his protection and education, and to the care of the property of the infant for its due management and preservation and proper application for his maintenance.'

"The rule is stated in 3 Pomeroy, Equity Jurisprudence, Sec. 1308, to be that: 'An infant having been made a ward of the court and a guardian being appointed, the further jurisdiction concerning the ward is ordinarily exercised by supervising, directi and controlling the acts of the guardian in the management of his trust.'

"In Gibson's Suits in Chancery, Sec. 970, the doctrine is thus announced: 'Whenever it is necessary for the welfare of an infant, idiot, or lunatic to convert his realty into personalty or his personalty into realty, or to invest his money or to ratify or avoid his contracts, the chancery court has authority to order it to be done and to superintend the execution of its order. In short, the chancery courts, acting *"in loco parentis,"* and as general guardian for minors, idiots, and lunatics, and persons of unsound mind, will do for them and their property what they themselves would in all probability have done if possessed of good reason and good conscience.'

"In the briefs of counsel the following quotation is given as having been taken from the annotations to *Richards* v. *Railway Co.*, 6 Am. & Eng. Decisions in Equity, 554: 'Courts of equity have plenary inherent jurisdiction over the business and estates of infants for their protection and preservation which extends to the care of their person so far as is necessary to their protection and education, and to the care of their property, real and personal, for its due management and preservation and its proper application to their maintenance; and consequently they will cause to be done whatever may be necessary to preserve their estate and protect their interests, their jurisdiction in the United States being limited to the judicial powers of the Chancellor in England, and not including his prerogative powers as the minister of the crown.'

"Similar provisions conferring jurisdiction upon county and probate courts of other states with reference to the affairs of minors and decedents have been held to confer upon such courts full and complete jurisdiction as to matters thus confided, and to embrace within the grant authority to afford such relief as was formerly administered by courts of equity in like matters.

* * * * * * * *

"In *Duff* v. *Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472, it was held that a lease granting oil and gas mining privileges for a term of years is not a sale of realty, as contemplated by section 5314, Comp. Laws, 1909, but, on the contrary, was a chattel real and was personal property. Under its equity powers the court of chancery was vested with power to order the ward's realty changed into personalty when it was for the best interests of the ward. 2 Story, Eq. Jur. (13th ed.), Sec. 1357; 3 Pomeroy, Eq. Jur., Sec. 1309; Gibson's Suits in Chancery, Sec. 970.

"It thus appears that County Courts of this state, in the exercise of their probate jurisdiction as conferred upon them by the constitutional and statutory provisions under consideration, have the authority in a proper case, when the circumstances may require for the best interests of a minor, to authorize a guardian to execute an oil and gas mining lease upon the lands of said minor for a term of years extending beyond the minority of the ward."

See, also:

Abraham v. *Homer*, 102 Okl. 12, 226 Pac. 45, 52;

Hoyt v. *Fixico*, 71 Okl. 103, 175 Pac. 517;

Papoose Oil Co. v. *Swindler*, 95 Okl. 264, 221 Pac. 506;

Adams v. *Tidal Oil Co.*, 237 Pac. 443 (not yet officially reported).

The Circuit Court of Appeals for the Eighth Circuit independently of the decision of the Supreme Court of Oklahoma in the *Cabin Valley Mining Co.* v. *Hall* case, also held that such authority existed in guardians when authorized by the County Courts in Oklahoma.

—*Mallen* v. *Ruth Oil Co.*, 231 Fed. 845.

In that case, after quoting section 6547, Revised Laws of Oklahoma, 1910, which reads as follows:

> "Guardians of infants and insane persons are hereby empowered to lease and grant mineral oil and mineral gas, in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court as now provided by law, where such consideration is money.",

that court says:

> "This section seems to us to afford explicit authority for the leasing of oil and gas lands belonging to minors by guardians of such minors, when authorized so to do by the appropriate County Court. It is noticeable that this section makes no limitation upon terms during which such leases may be made. This seems to be controlled by other provisions of the statutes, to which reference has already been made, which, among other things, empowers the guardians to make such sales and dispositions of the property of the ward as under all the circumstances the best interests of the ward may require. The determination of what the best interests of the ward requires is left to be determined by the County Court, upon such hearing as is appropriate in such cases.
>
> "Manifestly, for reasons stated by the learned district judge, terms of considerable duration would be justified, and in many cases imperatively demanded, if the interests of the ward were alone to be considered.

"To enforce the rule contended for by the plaintiffs in error in this case, that a guardian of a minor has no power to lease oil or gas properties for terms extending beyond the minority of the minor, might in many cases deprive the ward of the substantial advantage of the ownership by him of land bearing oil and gas. It may be, on account of its fugitive character, entirely dissipated or drained from his land before he reaches the age of majority, or it may be, as suggested by the district judge, impracticable to make leases for the short period of minority only."

So many leases have been made in reliance upon these decisions that a holding to the contrary now would produce a most chaotic condition in a great industry.

IV.

No constitutional rights of Leonard D. Ingram are invaded by the leasing of his lands beyond his minority.

We have shown by the authorities cited under Point 4 that it is clearly within the legislative authority to authorize sales of a minor's lands where it is for his best interest. We have shown by the decisions of the Supreme Court of Oklahoma and the Circuit Court of Appeals of the Eighth Circuit under the point last discussed that the authority to lease his lands for oil and gas purposes beyond minority arises from the fact that in many instances it would be for the best interest of the minor so to do. If the power resides in the law making body to authorize a sale of the fee where it is for the best interest of the minor, surely a power to sell a leasehold or chattel interest also exists. We cannot believe there is any merit in the contention that the sale of a lease beyond the ward's minority deprives the minor of any of his constitutional rights.

V.

The claim that Ingram had a constitutional right to retain the restriction against alienation of his homestead.

We think it sufficient to say in reply to this contention that this court in *Williams* v. *Johnston,* 239 U. S. 414, 420, and *Egan* v. *McDonald,* 246 U. S. 227, 229, has denied that Congress was without power to remove restrictions upon alienation. In the case first mentioned it was said:

> "It has often been decided that the Indians are wards of the nation, and that Congress has plenary control of tribal relations and property, and that this power continues after the Indians are made citizens and may be exercised as to restrictions on alienation. *Tiger* v. *Western Investment Company, supra.* Against this ruling *Choate* v. *Trapp* does not militate. In the latter case it was decided that taxation could not be imposed upon allotted land a patent to which was issued under an act of Congress containing a provision 'that the land should be non-taxable' for a limited time; and excluding the application of the *Tiger* case, it was said, page 673, that exemption from taxation 'and non-alienability were two separate and distinct objects.' And further 'one conveyed a right and the other imposed a limitation.' The power to do the latter was declared, and it was said: 'The right to remove the restriction (limitation upon alienation) was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right which Congress undoubtedly had the power to grant. That fully vested in the Indians and was binding upon Oklahoma.'
>
> "*Jones* v. *Meehan, supra,* is an instance of the same principle and is not opposed to the power of Congress to remove restrictions upon alienation."

And in *Egan* v. *McDonald, supra,* it was said:

> "Under the provisions of that statute and the terms of the trust patent, the heirs, as well as Weasel, were without power to convey title before the expiration of the twenty-five year period. But by paragraph 7 of the Act of Congress, May 27, 1902, 32 Stat. 275, adult heirs were given power to convey with the approval of the Secretary of the Interior; and it is declared that 'such conveyances * * * when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee.' Congress had, of course, power to remove the restrictions originally imposed upon alienation by heirs. *Williams* v. *Johnston,* 239 U. S. 414, 420."

With reference to the removal of restrictions this court in *Fink* v. *County Commissioners,* 248 U. S. 399, 404, said:

> "It is an error to suppose that this takes anything of value from the Indian. We may here invoke the commonplace for it is commonplace to say that we only know the value of the thing by that which makes its worth. Under the restriction against the alienation the land had no worth but in its uses; the restriction removed, it had the added worth of exchangeability for other things—a power of sale was conferred. To say there was no value in that power is to contradict the examples and estimations of the world."

This contention, therefore, is clearly without merit.

Every issue in this case has been decided numerous times. We believe there is no ground for controversy left as to any point raised by appellants. The judgment dis-

missing the bill, therefore, was clearly correct and we believe should be affirmed.

Respectfully submitted,

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In the

MINERVA JONES, PHILIP A. LEWIS, AND CARTER W. WESLEY, [illegible] of the Appellants,

v.

THE PEOPLES GAS & GAS COMPANY, Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

REPLY TO BRIEF OF APPELLEE.

J. ALSTON ATKINS,
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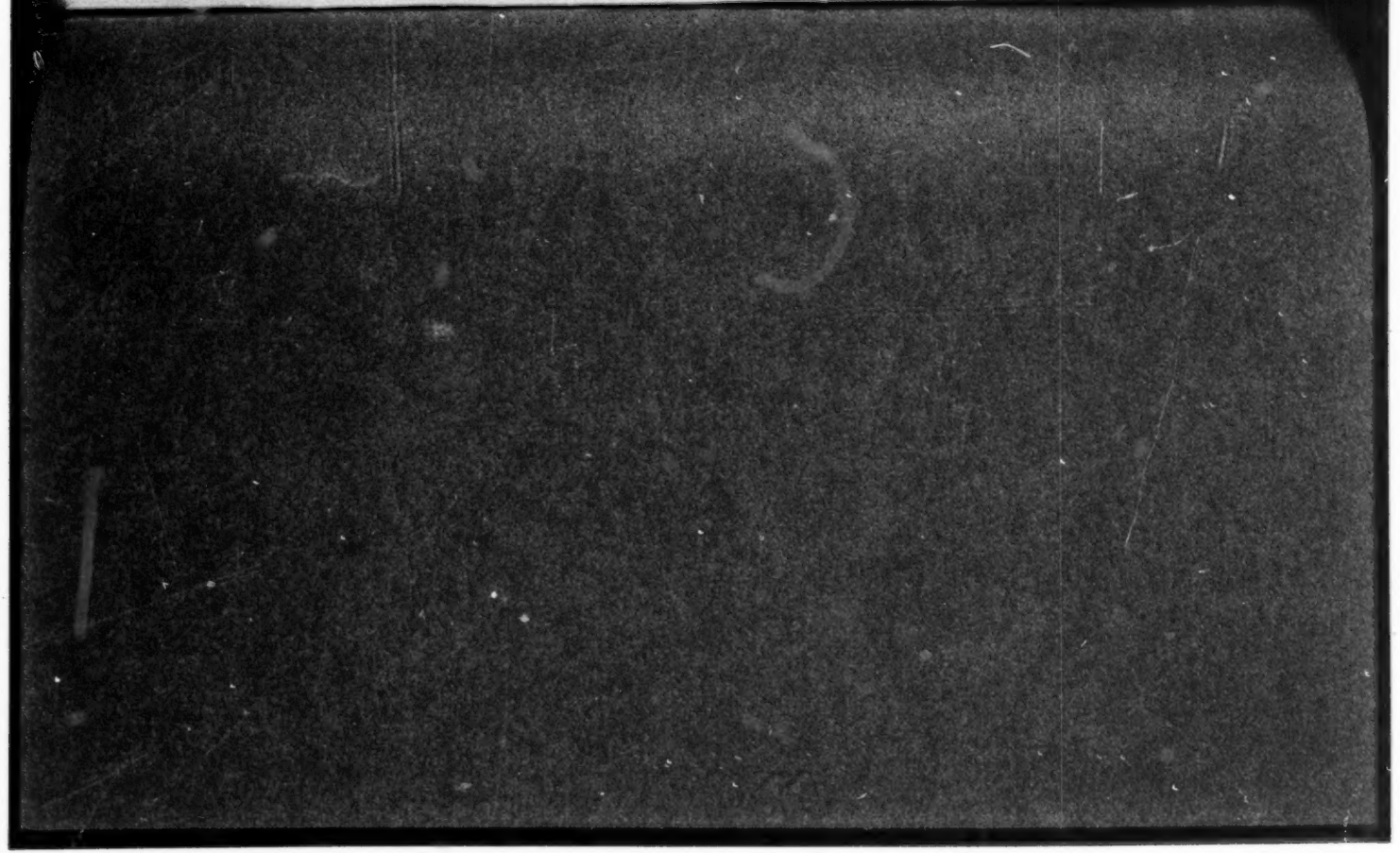

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AUTHORITIES CITED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 109.

MINERVA JONES, PHILLIP A. LEWIS, AND CARTER W. WESLEY, TRUSTEES, ETC., *ET AL., Appellants,*

vs.

THE PRAIRIE OIL AND GAS COMPANY, *Appellee.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

REPLY *to* BRIEF *of* APPELLEE.

For the reason that certain Oklahoma cases relied upon by the appellee in its brief have been overruled by the Supreme Court of Oklahoma since appellee filed its brief herein; and in order to call the court's attention specifically to some of the propositions set forth in the appellee's brief which appellants believe to be clearly unsound; and to point out that the appellee has failed in its brief to refute the arguments or to impugn the authorities cited by appellants, this reply to the brief of appellee is filed. Appellants will herein reply to the brief of appellee in the order and under the headings set forth therein.

Statement of the Case.

Appellee in its statement of the case goes to great length in its effort to show that Leonard D. Ingram, appellant, was a minor when the purported order appointing a guardian was made. We submit that whether one alleged to be under a disability due to minority is in fact a minor is wholly immaterial when considering the jurisdiction of the County Court, under the 14th Amendment, to find the fact of such disability without notice and opportunity to be heard having been first given to the alleged minor. *Rees* v. *The City of Watertown*, 86 U. S. 107, 22 L. ed. 72; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 59 L. ed. 1027. In the latter case this court said (pp. 1031-1032):

> "But, it is said, plaintiff in error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees* v. *Watertown*, 19 Wall. 107, 123, 22 L. ed. 72, 77."

With reference to the notice of the hearing for the appointment of a guardian, appellee contends that the bill when "properly construed, is not based upon the conten-

tion that no notice of any kind was given, but that the no tice which was given contained an improper date." (Appellee's brief, p. 4.)

Appellants concede that their second amended bill of complaint as amended upon the hearing of the motion to dismiss is based upon the contention that the purported notice of said hearing as given was legally no notice at all.

Appellee also urges on page 5 of its brief that Minerva Ingram, the alleged guardian, was the mother of Leonard D. Ingram. Appellants concede this fact.

ARGUMENT.

I.

"THE CLAIM THAT THE SALE OF AN OIL AND GAS LEASE IS THE SALE OF REAL PROPERTY AND THAT THE PROCEDURE PRESCRIBED FOR THE SALE OF REAL ESTATE OF A MINOR MUST BE FOLLOWED, HAS BEEN DENIED BY BOTH THE SUPREME COURT OF OKLAHOMA AND THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND THE CONTRARY HAS BECOME A RULE OF PROPERTY IN OKLAHOMA." (Appellee's brief, p. 6.)

"The question was first presented to the Supreme Court of Oklahoma in *Duff* v. *Keaton*, 33 Okl. 52 (92), 124 Pac. 291, wherein the contention now made by appellants was made." (Appellee's brief, p. 6.)

Appellants pointed out at the beginning of their brief (p. 25) that *Duff* v. *Keaton* was decided May 14, 1912, *after* the leases involved in this case were executed. Appellants also pointed out that, although the principle therein enunciated "*has* become an established rule of property in Oklahoma" (italics ours;) (page 11, brief of appellee), yet it *had not* become a rule of property at the time said leases were executed. Appellants cited and quoted (p. 24 of brief) from the leading case of *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, 54 L. ed. 228, which holds that federal courts are not bound by state decisions rendered after the date of the transaction out of which the rights of the parties arose. Appellee ignores this case.

Appellants also pointed out that state decisions cannot become rules of property so as to be binding on the federal

courts where those decisions are in conflict with the Constitution of the United States. *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed 896 (page 25 of brief). Appellee does not discuss this proposition.

The cases from the Circuit Court of Appeals for the Eighth Circuit, cited by appellee on pages 8 to 11 of its brief, show clearly in the opinions that the court regarded the Oklahoma decisions on this question as having become a rule of property in Oklahoma *so far as the leases in those cases were concerned.* If it be argued that they go further and hold that the decisions by the Supreme Court of Oklahoma establish a rule of property as to transactions under which the rights of the parties accrued *prior* to these Oklahoma decisions, then such cases from the Circuit Court of Appeals are manifestly in conflict with the case of *Kuhn* v. *Fairmont Coal Company, supra*, and are therefore not authority upon the question in this case.

Appellee concludes its argument under this issue with this statement: "To disturb it (the alleged rule of property) now would undoubtedly, as Circuit Judge SANBORN states, disturb many titles to oil and gas leases in Oklahoma." In the first place only such leases as were made prior to May 14, 1912, (when *Duff* v. *Keaton, supra*, was decided) would be affected by such a decision in this case. In the second place, the fact that there may be other void leases is no argument tending to prove the validity of the leases involved in this case.

II.

Point 1.

"The requirements of the Oklahoma law as to notice for the appointment of a guardian for a minor." (Appellee's brief, p. 12.)

"It will thus be seen that the law of Oklahoma requires that notice to relatives residing in the county and to any person having care of the minor must be given, but the kind of notice so to be given is left to the discretion of the county judge, who must cause such notice as he deems r e a s o n a b l e to be given them." (Brief of appellee, p. 17.)

The Oklahoma cases cited by the appellee as authoritative on this point have, in effect, been overruled by recent decisions of the Supreme Court of the State of Oklahoma, and the cases of *Ross* v. *Groom, et al.*, 90 Okl. 270, 217 Pac. 480; *Johnson* v. *Furchtbar*, 96 Okl. 114, 220 Pac. 612, and *Crabtree* v. *Bath*, 102 Okl. 1, 225 Pac. 924, relied upon by appellee on pages 14 to 16 of its brief, have been expressly overruled. In overruling these cases the Supreme Court of Oklahoma says the following:

"It is the theory of the defendant in error, John R. Harness, that there is nothing cited in the record to show that the county judge did not have reasonable notice given under this provision of the statute, and that said notice so given was sufficient for the reasons: *First*, it was deemed to have been reasonable notice by the trial court and evidently complied with the statute in such cases, *which leaves it to his sound discretion as to just what notice shall be given in such cases; and, second, that, the County Court of Muskogee County*

being a court of general jurisdiction, on a collateral attack this court will indulge the presumption that the law was complied with and that reasonable notice was given, and that on collateral attack plaintiff in error is estopped to show the contrary.

"We cannot agree with this contention. The statute quoted clearly contemplates that the relatives in the county and persons having the care and custody of the ward should have some kind of actual information of the hearing of the petition for the appointment of the guardian. To hold that the posting of notice in three public places in Muskogee County is sufficient, in view of the fact that the mother and stepfather of the minor, residing in Muskogee County, had the care and custody of the minor, would be to place a construction upon said section of the statute not within the intent of the legislature.

"It is true the statute gives the county judge discretion to select such means as he deems reasonable in informing the relatives of the time and place of the hearing of the petition for appointment of a guardian, but it was never intended, we think, in so important a matter as appointing a guardian for a minor child living with its parents in the jurisdiction of the court, to give only constructive notice of such hearing.

"Actual notice is required to be given to the relatives of a minor residing in the county where guardianship is sought whenever actual notice of the time and place of hearing can be had on such relatives; the method or manner of giving such actual notice to be such as the county judge deems reasonable. *In other words, the clear meaning of the statute, as we view it, is that constructive service is to be resorted to only in those cases where there can be no actual service made.*

* * * * * * * *

"The judgment of the District Court is reversed, with directions to overrule the demurrer, and the rule and doctrine laid down in *Ross* v. *Groom*, 217 Pac. 480, 90 Okl. 270; *Johnson* v. *Furchtbar*, 220 Pac. 612, 96 Okl. 114, and *Crabtree* v. *Bath*, 225 Pac. 924, 102 Okl. 1, in so far as they are in conflict with the views herein expressed, are expressly overruled." (Italics ours.)

—*Meyers* v. *Harness* (Okl.), 244 Pac. 1109 (not officially reported).

This case has been followed in the still more recent case of *Smith* v. *Page, et al.* (Okl.), 246 Pac. 217 (not officially reported).

It is clear that extra-official notice or notice as a mere matter of favor is not sufficient. *Coe* v. *Armour Fertilizer Works, supra.* Hence the mailing of this notice, requiring persons interested to appear on an impossible date, was legally insufficient.

In other words the posting of notice of a hearing to be had on January 3, *1910*, is no notice of a hearing to be had on January 3, 1911. The correct and sound rule on this point is expressed by Justice MILLER, speaking for the Supreme Court of Iowa in the case of *Lyon* v. *Vanatto, et al.*, 35 Iowa 521, as follows:

"* * * The notice which a party must have, however, is not any papers that may be served on the party, but a writing which informs him of the proceeding and the time and place where action will be taken therein against him. The service of a notice informing the defendant of the pendency of an action against him, but which fails to inform him where or when he is re-

> quired to appear, is therefore *no* notice of such proceeding."

And, consistently with the rule laid down above, in the case of *Cummings, et al.*, v. *Landes, et al.*, 140 Iowa 80, 117 N. W. 22, it is stated that:

> "To name an impossible day is equivalent to naming no day at all, and such an omission renders the notice, not merely defective, but no notice at all."

Nor is the mailing by some private citizen, as a matter of favor, of a notice of a hearing to be had on January 3, *1910*, actual notice of a hearing to be had on January 3, *1911*.

Point 2.

> "The clerical error in giving the wrong year in the notice for hearing did not invalidate it." (Appellee's brief, p. 17.)

By retrospective reasoning and explanation the appellee attempts to make a *paper* which alleged that certain proceedings would be had on January 3, 1910, a legal notice to a person of proceedings to be had on January 3, 1911. It adds no vitality to the paper to attribute its fatal desideratum to "clerical error." If this were so the last vestige of protection now afforded persons under the provisions of law requiring notice would be thus explained away. The possibilities and consequences of clerical errors are myriad. The determinative question is not whether naming of an impossible date in a notice was done by clerical error, but whether the date is material. If the date is material the naming of an improper or impossible date

renders the notice void. *Lyon* v. *Vanatta, et al.*, and *Cummings, et al.*, v. *Landes, et al., supra.* In these cases, as in the instant case, the date is material because the party to whom the notice is directed has no other means of knowing when he is to appear except by the notice itself. Appellee argues, on page 18 of its brief:

> "It is clear that no one receiving this notice could have been *misled* by the *clerical* error in naming the date for hearing as in January, 1910, rather than January, 1911, for the notice upon its face showed that it was issued on the 15th of December, 1910, and therefore it was plainly intended a notice of a hearing in the *following* January. Such a clerical error, not tending to mislead anyone, would not operate to make the appointment of the guardian based upon such notice void." (Italics ours.)

That this argument is unsound is apparent from reading it. In the first place the appellee *assumes* that the party receiving such a purported notice would know the true date thereof, and, seeing several dates would be able to determine which was true and which attributable to clerical error. The party would have to go still further and determine at his peril just what the date would have been had there not been any clerical error; as, in this case, according to appellee, "1910" would mean "following." Indeed, if natural persons have such supernormal reasoning faculties or such occult sources of information, there would be little if any need for notice in any kind of legal proceeding. The situation is not remedied by showing that the wrong date would not *mislead* anyone, as appellee at-

tempted to do. The purpose of a notice in legal proceedings is to positively inform parties, not merely not to mislead them.

Not a single case cited by appellee has any bearing whatever upon the question of the validity of the purported notice. In all the cases cited on this question by appellee on pages 18 to 22 of its brief, the time when the defendants were required to appear was *fixed by statute*, and this is shown in the opinions in these cases quoted from by appellee. The summonses in those cases would have been valid if no date had been given. Therefore, the naming of any date in the summons was surplusage and immaterial. It is clear that such cases are not authority upon the question of the effect of naming of an impossible date in a notice, where the only date and the material date under the law is that fixed by the notice itself. Manifestly the naming of an impossible date in such a case is material and renders the notice void.

POINT 3.

"NO NOTICE TO THE MINOR WAS REQUIRED, AND THE PRESUMPTIONS ARISING FROM THE APPOINTMENT OF A GUARDIAN ESTABLISH THAT NOTICE SUFFICIENT WAS GIVEN."
(Appellee's brief, p. 22.)

Appellee thus concedes that not only does the law of Oklahoma assume that a person alleged to be a minor is in fact a minor, and that he has no other argument against the appointment of a guardian for his person and estate, but, that such assumption is held by the Supreme Court of Oklahoma to be conclusive on collateral attack.

Point 4.

"Notice to an infant of proceedings for the appointment of a guardian for him and his property is not required by the Constitution of the United States." (Appellee's brief, p. 25.)

"It is claimed that since the Oklahoma statute does not require notice to the minor of the application for the appointment of a guardian and since it authorizes a guardian duly appointed to make conveyances for the minor's benefit of his property, that the appointment of a guardian for Leonard D. Ingram deprived him of his property without due process of law. The fallacy in the appellants' argument lies in the fact that they fail to distinguish between *the power of the legislature, acting as parens patriæ in respect to minors and for their benefit,* and in prescribing rules of procedure for contests between adversary parties." (Italics ours;) (Appellee's brief, p. 25.)

Appellee's entire argument under this point is given over to discussing and quoting from cases which discuss the *power of the legislature* to act as *parens patriæ* for minors, lunatics and other incapacitated persons. Appellants nowhere in their brief deny this power of the legislature thus to act for persons who have been found according to due process of law to be under legal disability to act for themselves.

But appellants do contend that the legislature had no power to authorize the County Court of Wagoner County, Oklahoma, to find that the appellant, Leonard D. Ingram, was under a legal disability due to minority, without notice and opportunity to be heard having first been given. This

is the extent of appellants' argument under Issue V, page 66 of their brief; but to this argument and the authorities cited in support thereof appellee made no answer. Appellee, as well as the decisions relied upon, *assume* the fact of disability; and their discussion of the power of the Legislature to act as *parens patriæ* is based upon this assumption.

Further, appellee cites authorities in support of this constitutional proposition, which are hardly authority therefor.

On page 26 of its brief is set forth a quotation from Judge Cooley on Constitutional Limitations (3rd ed.), 106, which in part is as follows:

> "The case [of selling the estate of a minor] is eminently one for judicial investigation. There are facts to be inquired into, in regard to which it is always possible that disputes may arise; the party in interest is often incompetent to act on his own behalf, and his interest is carefully to be inquired into and guarded; and as the proceeding will usually be *ex parte*, there is more than the ordinary opportunity for fraud upon the party *interested*, as well as upon the authority which grants permission. *It is highly and peculiarly proper therefore that by general laws judicial inquiry should be provided for these cases, and that these laws should provide for notice to all proper parties, and an opportunity for the presentation of any facts which might bear upon the propriety of granting the applications.*" (Italics ours.)

The essentials of notice and an opportunity for the presentation of facts bearing upon the propriety of granting the order are entirely missing in this case.

And in the case of *Hoyt* v. *Sprague*, 13 Otto 613, 103 U. S. 633, cited at length by appellee at page 28, this court was discussing a joint resolution of the Legislature of Rhode Island, passed March 9th, 1863, and entitled "Resolution authorizing Mary Sprague, of Warwick, guardian, to make conveyance of the interest of minors in and to the property of the firm of A. & W. Sprague." It is obvious that the *Hoyt* case can have no bearing whatever on the issue of the constitutionality of the Oklahoma statute: *First*, in the *Hoyt* case the court was discussing a special statute; *second*, the statute was passed and acted upon prior to the adoption of the 14th Amendment, hence no question of due process of law under that amendment could have been involved; *third*, Mr. Justice BRADLEY, speaking for this court, expressly excluded from the rule enunciated cases where there might be constitutional prohibition.

In the Massachusetts case of *Appeal of Gibson*, 28 N. E. 296 (cited on page 31 of appellee's brief), it is pointed out in the opinion that the holding in that case in regard to notice is inconsistent with the law of that same jurisdiction on the necessity of notice for the appointment of a guardian for an idiot or lunatic; in the latter cases notice and an opportunity to be heard being essential. That court attempts to justify the distinction on the ground that in the case of a minor (an alleged minor), he is *presumed* to be in the care and custody of parents or other guardians: which is to *presume* one of the essential jurisdictional facts, and the very fact the alleged minor might desire to contest. By parity of reasoning a person alleged to be an idiot should be *presumed* to be an idiot.

III.

"THAT A GUARDIAN HAS POWER TO EXECUTE, AND THE COUNTY COURT TO APPROVE, A LEASE FOR OIL AND GAS PURPOSES BEYOND THE MINORITY OF THE WARD IS SETTLED BY THE DECISIONS OF THE SUPREME COURT OF OKLAHOMA AND BY THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT, AND HAS BECOME A RULE OF PROPERTY IN OKLAHOMA." (Appellee's brief, p. 35.)

"The question of the right to lease for oil and gas mining purposes beyond the minority of the ward was first presented to the Supreme Court of Oklahoma in the case of *Cabin Valley Mining Co.* v. *Hall*, 53 Okl. 760, 155 Pac. 570." (Appellee's brief, p. 35.)

The case of *Cabin Valley Mining Co.* v. *Hall*, *supra*, was decided February 15, 1916, long after the leases in this case were executed. The case of *Cabin Valley Mining Co.* v. *Hall*, *supra*, and subsequent cases following it, could not, therefore, establish a rule of property which would be binding upon the federal court in this case. *Kuhn* v. *Fairmont Coal Company*, *supra*.

IV.

"NO CONSTITUTIONAL RIGHTS OF LEONARD D. INGRAM ARE INVADED BY THE LEASING OF HIS LANDS BEYOND HIS MINORITY." (Appellee's brief, p. 43.)

Appellee dismisses the contention made by appellants under this issue, as well as the authorities cited in support thereof, with this single sentence:

"We cannot believe there is any merit in the contention that the sale of a lease beyond the ward's minority deprives the minor of any of his constitutional rights." (Appellee's brief, p. 43.)

Nor, from what appears in its brief, can appellee believe that its opinion in this connection is based upon any reason or authority, for no reason is given nor is any authority cited.

V.

"THE CLAIM THAT INGRAM HAD A CONSTITUTIONAL RIGHT TO RETAIN THE RESTRICTION AGAINST ALIENATION OF HIS HOMESTEAD." (Appellee's brief, p. 44.)

Appellee cites three cases from this court as being decisive of this question. These cases are as follows:

Williams v. *Johnson*, 239 U. S. 414, 60 L. ed. 358;
Eagan v. *McDonald*, 246 U. S. 227, 62 L. ed. 680;
Fink v. *Board of County Commissioners*, 248 U. S. 399, 63 L. ed. 324.

These cases are not authority upon the question as presented in this case, as will appear from an examination of the facts and holdings therein.

In the case of *Williams* v. *Johnson, supra*, it does not appear that the alleged exemption was not contained in the allotment deed as in this case, and the allottee had applied for and accepted a certificate of the removal of the restrictions, and had acted upon the certificate by conveying the land. Not only is this true, but in *Williams* v. *Johnson*, the allottee was not raising the question; the significance of which will appear from an examination of *Fink* v. *County Commissioners, supra*, which will be done below.

In the case of *Eagan* v. *McDonald, supra*, the allottee had died, and the land had been conveyed by the heirs of

the allottee over six years after Congress had passed an act which authorized the heirs to convey. Not only so, but the heirs were not raising any question as to the removal of the restrictions. Heirs, of course, take only such title as the law prescribes.

The case of *Fink* v. *County Commissioners, supra,* shows clearly the significance of the fact in both *Williams* v. *Johnson,* and *Eagan* v. *McDonald, supra,* that the allottee was not complaining of the removal of the restrictions; but, on the contrary, in *Williams* v. *Johnson,* both the United States and the allottee had given their consent to the removal. In the *Fink* case this court held that the immunity from taxation provided for in the homestead deeds issued to members of the Creek Nation existed only so long as the land was held by such members and they were resisting such taxation.

What are the facts in the instant case? *First,* the lease sought to be set aside here was not made by the allottee, but by an alleged guardian, who was appointed without any notice or opportunity to be heard having been given; and was executed without the slightest formality, so far as notice or competitive bidding is concerned, and for a period as long as the land is valuable. *Second,* the allottee has in no way consented to this lease or to the act which attempts to remove the restriction so as to authorize the lease. The allottee, himself, is making complaint. It is clear that the facts in the instant case take it out of the rule laid down in the *Williams* case and the *Eagan* case, *supra,* and bring it squarely within the principle and reasoning of the *Fink*

case *supra*, and the case of *Choate* v. *Trapp*, 224 U. S. 665, 56 L. ed. 941.

Conclusion.

In its conclusion, on page 45, appellee's brief states that "every issue in this case has been decided numerous times." Then the question naturally arises: Why are not these numerous decisions called to the attention of this court? Indeed, the constitutional question of whether a guardian has power to lease a minor's land for a period extending beyond his minority is dismissed by appellee without the citation of a solitary authority. The appellants submit that the arguments set forth in their brief have not been answered, and the authorities upon which those arguments are based have not been impugned.

Wherefore, appellants pray that the decree of the District Court be reversed, and that a decree be entered here in favor of appellants and against the appellee.

Respectfully submitted,

J. Alston Atkins,
Of Counsel.

Carter Walker Wesley,
Solicitor for Appellants.

SUPREME COURT OF THE UNITED STATES.

No. 109.—October Term, 1926.

Minerva Jones, Philip A. Lewis, and Carter W. Wesley, Trustees, etc., and Leonard D. Ingram, Appellants,
vs.
The Prairie Oil and Gas Company.

Appeal from the District Court of the United States for the Northern District of Oklahoma.

[January 24, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity seeking the cancellation of oil and gas leases to, or held by, the Prairie Oil and Gas Company, and for an account. The fundamental facts are as follows. Leonard D. Ingram was a member of the Muskogee (Creek) Nation and as such on July 1, 1907, received patents of homestead and other land, the homestead patent expressing the conditions provided by Act of Congress, that the land should be inalienable, &c., for twenty-one years. On January 3, 1911, the County Court of Wagoner County, Oklahoma, made an order appointing Minerva Ingram, now Minerva Jones, guardian of Leonard D. Ingram. On January 24, 1911, March 28, 1911, and December 18, 1911, Minerva Ingram, acting as guardian, made the leases in question, covering the above lands and running for as long after the minority of Leonard Ingram as oil or gas should be found in paying quantities. The defendant company began to remove oil and gas in 1920 and is continuing to do so still. The leases are said to be invalid for several reasons: It is alleged that the appointment of Minerva Ingram as guardian was void under the Fourteenth Amendment of the Constitution because no notice of the application for appointment was given. It is alleged further that the guardian had no power to execute leases that would or might outlast the minority of the ward, as that again is thought to be contrary to the Fourteenth Amendment. Thirdly it is urged that the inclusion of the homestead was invalid because of the condition against alienation in the patent under the Act of

Congress, notwithstanding the later Act of May 27, 1908, c. 199; 35 Stat. 312, which is admitted to apply but is said to be ineffective under the Fifth Amendment, as depriving the minor of his property without due process of law. Finally it is averred that the leases were not executed in manner and form required by law. On motion the District Court dismissed the bill and the plaintiffs appealed to this Court. *Lipke* v. *Lederer*, 259 U. S. 557, 560.

The averment that the guardian was appointed without notice was qualified by an amendment showing an order for a hearing on January 3, 1911, and for notice by posting in three public places, one being the door of the Court House. The notice was posted as directed but although dated December 15, 1910, states January 3, 1910, instead of 1911, as the time for the hearing. It was also sent by mail to the minor, to Minerva Ingram and three others, stated to be next of kin and persons having the care of the minor. It is admitted that Minerva Ingram was the mother of the minor, and the record indicates that the latter was of tender years, or at least under twelve, which is not denied. The mother seems to have had him in her custody. The Oklahoma statutes only require such notice as the judge deems reasonable to be given to the relatives residing in the county and to any person having the care of such minor. Compiled Oklahoma Statutes, 1921, § 1431. In the circumstances stated, unqualified, the requirement of notice is merely formal, if it exists. *Lester* v. *Smith*, 83 Okla. 143. *Gibson, Appellant*, 154 Mass. 378, 379-381. Certainly there is nothing in the Constitution of the United States that requires it. See *Hoyt* v. *Sprague*, 103 U. S. 613. The clerical error in the notice would mislead no one and did not invalidate the proceedings. The mother was the petitioner and no one but the mother and son were concerned. We see nothing to overcome the presumption if any presumption were needed, in favor of the validity of the appointment, declared to exist by the Supreme Court of the State. *Baker* v. *Cureton*, 49 Okla. 15.

The Oklahoma statutes are held to give to guardians the power to execute oil and gas leases that may last beyond the minority of their wards. *Cabin Valley Mining Co.* v. *Hall*, 53 Okla. 760. *Mallen* v. *Ruth Oil Co.*, 230 Fed. Rep. 497; affirmed, 231 Fed. Rep. 845. The fugitive character of the subject-matter makes it necessary in the ward's interest that guardians should have that power,

and it appears to us that it would be an extravagant interpretation of the Constitution to hold that the ward's interest must be sacrificed on the ground of the absolute character of his title when adult. He takes that title subject to such qualifications as the law reasonably allows to be imposed for his good. The denial of the power as to agricultural (*Haddock* v. *Bronaugh*, 92 Okla. 197) or coal lands (*Tierney Coal Co.* v. *Smith*, 180 Ky. 815) whether right or wrong on constitutional grounds, cannot be extended to this case.

It is not open to dispute that the removal by the later Act of Congress that we have cited of the restriction upon alienation previously imposed is valid. *Williams* v. *Johnson*, 239 U. S. 414, 420. *Egan* v. *McDonald*, 246 U. S. 227, 229. *Fink* v. *County Commissioners*, 248 U. S. 399, 404.

It is admitted that if we follow the decisions of the Supreme Court of Oklahoma, both those that we have cited and others, the guardian did not have to follow the procedure prescribed for the sale of a ward's real estate. *Duff* v. *Keaton*, 33 Okla. 92. *Papoose Oil Co.* v. *Swindler*, 95 Okla, 264. See also *Jackson* v. *Gates Oil Co.*, 297 Fed. Rep. 549. *Clayton* v. *Tibbens*, 298 Fed. Rep. 18, affirming 288 Fed. Rep. 393. But it is argued here that under *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, this Court is not bound by the State decisions and may judge for itself, inasmuch as whatever may be the rule of property now, *Duff* v. *Keaton* was decided after these leases were made. It would seem from the cases cited that the present rule had been followed and great interests established on the faith of it before *Duff* v. *Keaton*. But apart from that consideration no case yet has gone to the length of undertaking to correct the construction of State laws by State courts. The exclusive authority to enact those laws carries with it final authority to say what they mean. The construction of those laws by the Supreme Court of the State is as much the act of the State, as the enactment of them by the legislature. If we thought the decisions cited far more questionable than we do, we nevertheless should bow to them as binding upon a matter of local administration and of only local concern. The counsel for the appellants presented a very thorough and well stated argument, but failed to make us doubt that the decree must be affirmed.

Decree affirmed.